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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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| CHEMEHUEVI TRIBE OF INDIANS, ET. AL., *Petitioners,* v. FEDERAL POWER COMMISSION, *Respondent.* | No. 73-1380 |
| ARIZONA POWER COMPANY, ET. AL., *Petitioners,* v. CHEMEHUEVI TRIBE OF INDIANS, ET. AL., *Respondent.* | No. 73-1666 |

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF OF BUFFALO RAPIDS IRRIGATION PROJECT; CUSTER ROD & GUN CLUB; TONGUE-YELLOWSTONE BEET GROWERS; and TROUT, UNLIMITED, as *AMICUS CURIAE*

Submitted by, JAMES H. GOETZ, 15 S. Tracy, Suite 8, Bozeman, MT., Attorney for *amicus curiae.*

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By consent of Petitioners, Respondents and Intervening Petitioners-Respondents endorsed hereon, TROUT, UNLIMITED, et. al., files this brief as *amicus curiae.*

## Interest of the Amicus Curiae

The *amicus curiae,* Buffalo Rapids Irrigation Project, Custer Rod and Gun Club, Tongue-Yellowstone Beet Growers, and Trout, Unlimited, have an interest in this case in that they have pending before the Federal Power Commission a Complaint and Petition to Show Cause[1] (filed in July, 1973)[2] which poses the same questions as those presented for decision in the instant cases, namely, whether the massive coal-fired electrical generating plants presently proposed to be constructed at Colstrip, Montana, by Montana Power Company and four Pacific-Northwest utilities[3], are subject to Federal Power Commission licensing jurisdiction under both Section 4(e) of the Federal Power Act, 16 U.S.C. §797(e), and the "project works" provision of the same act, 16 U.S.C. §797(e), because these plants will divert for *totally consumptive* use massive amounts of water from the Yellowstone River, a navigable river.

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[1] Section 18 C.F.R. §§1.6(a), (d), (1972).

[2] F.P.C., Docket No. E-8335.

[3] The other utilities are: Puget Sound Power & Light Co., Portland General Electric Co.; Washington Water Power Co.; and, Pacific Power and Light Co.

## ARGUMENT

### A. THE NORTHERN GREAT PLAINS

This brief does not attempt to treat the complex legal issues in these cases in an exhaustive manner. That has been done competently by the parties. The purpose of this brief is to place before this Court a different factual perspective — stemming from coal-fired electrical power development on the Northern Great Plains — so that this Court will be able to reach the very important legal issues presented in these cases with a more comprehensive understanding of the factual ramifications.

Montana and Wyoming contain under present calculations forty-six per cent (46%) of the nation's strippable reserves of bituminous coal and lignite. Strippable coal is found in this area (called the "Fort Union Formation") in seams of five (5) to two hundred fifty (250) feet in thickness with ten (10) to two hundred (200) feet of overburden[4]. Western coal, particularly that of the Fort Union Formation, because of its low sulfur content, is in high demand to satisfy this nation's seemingly insatiable energy needs.[5]

In 1970 and 1971, the United States Bureau of Reclamation, in conjunction with a number of utilities prepared the "North Central Power Study" which covered the states of Idaho, Montana, Wyoming, Colorado, North

[4] See: Melcher, Albert G., et. al., *Wanted-A Better Approach to Energy Planning*, ROMCOE, Denver, Colo. See also, "North Central Power Study," Report of Phase I, Vol. II, Bureau of Reclamation.

[5] See: *Second Annual Report*, Montana Environmental Quality Council, October, 1973.

Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa and Missouri. One summary which demonstrates the magnitude of the potential coal development in that area states as follows:

> "Proven strippable coal resources in the region are capable of sustaining well over 200,000 mw in thermal power plants of 1,000 mw or more, with 35-year economic lives. This is only a small part of the coal resource potential in the NCPS area. Forty-two potential sites have been identified. Ten of these, each for a 10,000 mw plant, are located in one area of about 30 by 70 miles centered on Gillette, Wyoming . . .
> (Footnote 4: . . . A 10,000 mw plant will be about 14 times as large as the renowned 'Four Corners' plant at Farmington, New Mexico, was when it first created the concern about air quality from the Southwest power plants. The Four Corners plant is being expanded to about 2,100 mw, still about one-fifth the size of some contemplated for the NCPS area . . .)"[6]

The development of electrical power from coal in the Northern Great Plains area is largely dependent on the supply of water. The 1973 report of the Montana Coal Task Force states:

> "Water controls all activity in this semiarid region, and the industrial future of the Fort Union coal fields is no exception because coal-based development requires enormous quantities of water for cooling and conversion. Because

[6] Id., Melcher, p. 10.

> most of the coal fields are far removed from existing surface water sources, the nature and extent of development would depend on the quantity of water made available at the mine site. A large volume of easily accessible water would allow extensive generating and conversion complexes. If this supply is not provided through several new storage facilities and an intricate system of government pipelines, development would be more restricted and probably concentrated on mining and export of coal."[7]

The major potential source of water for Fort Union coal development is the Yellowstone River system. The Yellowstone River begins high in the mountains of Yellowstone National Park and winds its way in a northeasterly direction through eastern Montana, and flows into the Missouri River near the Montana-North Dakota border. Although several tributaries of the Yellowstone have dams, the main stem of the Yellowstone is essentially unencumbered by man-made developments. At all points in the area of the coal development in question, the Yellowstone River is navigable.[8] The effect that coal development will have on the Yellowstone River has been stated as follows:

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[7] *Coal Development in Eastern Montana, A Situation Report of the Montana Coal Task Force,* January, 1973, p. 9.

[8] *Crow Tribe v. USA,* Civil No. 214, U. S. Dist. Ct. D. Mont., Judge Jameson, October 1, 1963; (this decision found the Big Horn river navigable to its confluence with the Little Big Horn and therefore subject to Federal jurisdiction. The Big Horn is a tributary of the Yellowstone. *A fortiori,* the Yellowstone is navigable at least to its confluence with the Big Horn, a point upstream from the Colstrip diversions.

> "One of the most significant coal-development issues is the prospect of massive consumption of water from the Yellowstone River and tributaries. The U. S. Bureau of Reclamation projects a possible annual water requirement of 2.6 million acre feet. This volume represents 29.7 percent of the river's average annual discharge (8.8 million acre feet per year), and in a dry year, such as those experienced in the early sixties, the river's annual discharge might be only half that figure. The same projected level of consumption would leave 1.8 million acre feet of water in the river in such a year, or 20.5 percent of the average flow. Once such industrial water consumption commences, it may be expected to continue regardless of the flow conditions, in the Yellowstone River System. The market place will continue to demand power."[9]

Thus, the problem of coal development and conversion into electrical energy and the accompanying demand for massive amounts of water has become a focal one. The recently-published study sponsored by the Ford Foundation and the National Academy of Sciences, *Rehabilita-*

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[9] *Supra.*, Note No. 7, p. 39. See also: Anderson, Bob, "Water and Eastern Montana Coal Development," *Second Annual Report*, Montana Environmental Quality Council, October, 1973. "What effect will massive diversions have on these flow regions? If all of the options and applications for water are realized, about 2.7 mafy (3,730 cfs) will be diverted; presumably most or all of this water would be consumed. A glance at Figures 1 & 2 clearly shows that the Yellowstone often does not even have that much water . . .

*tion Potential of Western Coal Lands*, is quite blunt about the problem:

> "The shortage of water is a major factor in planning for future development of coal reserves in the American West. Although we conclude that enough water is available for mining and rehabilitation at most sites, *not enough water exists for large scale conversion of coal to other energy forms* (e.g. gasification or steam electric power). The potential environmental and social impacts of the use of this water for large scale energy conversion projects would exceed by far the anticipated impact of mining alone. We recommend that alternate locations be considered for energy conversion facilities, and that adequate evaluations be made of the options (including rehabilitation) for the various local uses of the available water."[10] (emphasis added)

Earlier this year, the rate of water diversions in Montana became so alarming that Governor Judge proposed a 3-year moratorium on water diversions from the Yellowstone River (S.B. 728; the bill was passed). In introducing the moratorium proposal, the Governor stated:

> "With a near annual flow of about 9 million acre feet of water at our border, options, applications and requests have been made for approximately

[10] ***Rehabilitation Potential of Western Coal Lands,*** **A report of the Energy Policy Project of the Ford Foundation, National Academy of Sciences, Ballinger Publishing Co., 1974, p. 6.**

3,300,000 acre feet from waters in the Yellowstone Basin. In 1972, the Bureau of Reclamation projected that 2.6 million acre feet would be needed annually for coal development by the year 2002. In less than two years, that figure has already been far exceeded, and all indications are that this amount will grow significantly within the immediate future."[11]

## B. THE COLSTRIP PLANTS

The specific interest of the *amicus curiae* is focused on the Yellowstone River in Montana, and the massive electrical generating plants which are being constructed (or contemplated) at Colstrip, Montana. The Montana Power Company, together with the Puget Sound Power and Light Co., are currently constructing two plants at Colstrip, Montana, with a proposed total capacity of 350 mw each. These two companies, together with three other utilities have proposed two more plants at Colstrip, each with a capacity of 700 mw.

These four plants will be coal-fired steam-generating plants with wet cooling (i.e. water-consumptive) processes. They will demand substantial amounts of water with no return flow to the river, as occurs with agricultural usage. For the Colstrip Units alone, the water demand will necessitate the construction of a 60-inch pipeline from the Yellowstone River near Nichols to the generating complex at Colstrip, a distance of about 30 miles.[12] Water consumption for Units 3 and 4 will average about 16,000 acre feet

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[11] Senate Journal of the Forty-third Legislature of the State of Montana, Vol. 1, p. 172.

[12] See: Note 7, *Supra*, p. 13.

a year with a maximum of up to 26,000 acre feet. Settling ponds covering 60 surface acres will be necessary.[13] These withdrawals will affect navigability since pumping structures will be located in the Yellowstone River. The complaint filed by the parties *amicus curiae* with the Federal Power Commission (Docket No. E-8335) has not been acted upon by the FPC for over one year. The parties *amicus curiae* are irrigation farmers (primarily growing sugar beets) downstream from the Colstrip diversion who are dependent upon a regular and adequate flow of the Yellowstone River, particularly in the late summer and early fall, and recreational users who make substantial use of the Yellowstone River for fishing, hunting and aesthetic purposes. The Montana Power Company appropriation will make use of surplus water from a government dam—namely, the Yellowtail Dam on the Big Horn River, a major tributary to the Yellowstone.

The water appropriation made on the Yellowstone River by the Montana Power Company (dated December 16, 1970) claims an appropriation of 250 cubic feet per second (112,200 gallons per minute) on all days and at all seasons of the year.[14] This appropriation was made pur-

[13] Gill, Thomas J., "Montana Coal-Development in Process 1973," *Second Annual Report*, Montana Environmental Quality Council, October, 1973. Non-water effects relating to the construction of proposed Units 3 and 4 include the consumption of about 6 million tons of coal per year and the construction of a 500 kilovolt transmission line between Colstrip and Hot Springs, Montana, a distance of about 400 miles.

[14] Montana Water Resources Board, 1970, Montana Power's Notice of Appropriation.

Note: This appropriation equals approximately 181,000 acre feet per year. Approximately 20,000 acre feet per year is consumed annually by a 1,000 mw electrical

suant to the traditional Montana Water Law based on the prior appropriation theory — *i.e.* anyone has the right to appropriate unappropriated water as long as such water is put to beneficial use, Section 89-801; 89-802, Revised Codes of Montana (1947).[15] The Montana Power appropriation indicates the ease with which a person or a corporation can take the public's water. A part of the Yellowstone River is being studied by the Bureau of Outdoor Recreation for designation under the Wild and Scenic Rivers Act, P.L. 90-542,[16] yet, a corporation with a stroke of the pen can irreversibly dewater the stream. This total lack of Federal control over a river of national importance,[17] which is navigable and therefore subject to Federal jurisdiction, is one of the unfortunate and anomalous consequences of the failure of the Federal Power Commission to assert jurisdiction. Given the magnitude of the potential generating capacity of the strippable coal reserves of the Northern Great Plains, the first four Colstrip plants represent only

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generating plant operating at full load and using an evaporative tower for cooling (*Rehabilitation Potential of Western Coal Lands, Supra*, p. 101). By these calculations, the appropriation by Montana Power could suffice for nine 1,000 mw plants.

[15] These sections have been repealed and the general Montana Water Law has been modified. See Section 89-866, *et. seq.*; nevertheless the appropriation by Montana Power Co. may well be at least partially valid by operation of the grandfather clause, §89-872, Revised Codes of Montana (1947). In any case, prior appropriation and beneficial use remain the operative factors governing Montana Water Law.

[16] See, Draft, "The Wild, Scenic and Recreational Potentials of the Yellowstone River, from Gardiner to Pompey's Pillar in Montana," prepared by Bureau of Outdoor Recreation, Mid-continent Region, Denver, Colorado, May, 1974.

[17] Ibid.

the beginning of a massive draining of the water resources of the region. That this can occur without the regulatory supervision of the Federal Power Commission, or any other Federal agency, does violence to the goal of comprehensive water resource planning that stimulated passage of the original Federal Water Power Act of 1920.

## C. COMPREHENSIVE REGULATION OF WATER RESOURCE DEVELOPMENT

While there is undeniably substantial legislative history which seems to focus on the *hydroelectric* basis for the development of the Federal Water Power Act of 1920, the central purpose of the act was to provide for a *comprehensive* scheme of water development vis-a-vis power production. The Supreme Court discussed the history and purpose of the Federal Water Power Act in 1946 in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152. The Court described the general purposes of the Act as follows:

> "It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a *complete scheme of national regulation* which would promote the *comprehensive* development of the water resources of the Nation, in *so far as it was within the reach of the federal power to do so*, instead of the piecemeal, restrictive, negative approach of the Rivers and Harbors Acts and other federal laws previously enacted.
>
> It was a major undertaking involving a major change of national policy. That it was the intention of Congress to secure a *comprehensive* development of national resources and not merely

> to prevent obstructions to navigation is apparent from the provisions of the act . . ." (emphasis added) (at 172 note 17).

The legislative history of the Federal Water Power Act reveals that a variety of concerns motivated the passage of the Act.[18] Among the concerns were: protection of navigability, removal of a disincentive for private hydroelectric development so that increased private power development would take place (by eliminating the uncertainty as to what the government would do once private dams were built)[19]; conservation of water resources through comprehensive planning[20]; and protection of the public's interest in its water from laissez-faire exploitation by the corporations.

In 1919, Senator Jones of Washington, said in respect to the 1919 version of the Federal Water Power Act:

> "The development of our water powers is intimately connected with the solution of such great national problems as the national defense; extension of internal waterways; shortage of food; conservation of coal, oil, and labor; irrigation of arid lands; and railroad car shortage."[21]

There was much debate over whether the powers of the Commission under the 1917 Act (Rivers and Harbors Act

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[18] This *amicus* brief does not purport to treat this legislative history exhaustively since this has been done by the parties.

[19] See Kerwin, J., *Federal Water Power Legislation* (1926), at 202-207; see also 1919 Cong. Rec. 244, Senate Debates.

[20] 66th Congress, 1st Session; House Committee on Water Power, Report No. 61, p. 3, p. 6.

[21] 1919 Cong. Rec. 241.

of 1917, 40 Stat. 269) should be retained by the Commission under the 1920 Act. Although the 1917 Act was expressly repealed, those favoring an expansive view of the powers of the Commission were assured that the essence of the Newlands Bill (the 1917 Act) was retained. After quoting from the 1920 bill (Secs. 4a and 4b), Senator Jones said:

> " . . . the splendid ideas of this great man have been very largely incorporated in the measures to which I have referred, and, while the pending bill proposes to repeal the clause which provided for that commission, we are continuing in a legislative way the great ideas of Senator Newlands to a very great extent."[22]

Newlands had argued for a very comprehensive water resources management system and the 1917 Act was passed to implement that system although a commission had not yet been appointed by the President under that Act.[23]

While it is clear that much of the Congressional debate *focused* on hydroelectric power, it is by no means clear that the framers purposely omitted steam power from Federal regulation as the Circuit Court suggests at p. 1231 of its opinion. This Court should, if possible, read the statutes in a manner which would result in a rational system of regulation by the Federal Power Commission. The attempt by the Circuit Court to make a distinction

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[22] 1920 Cong. Rec. 7772.

[23] See 1920 Cong. Rec. 7725, Senator Hale: "The present water-power act provides a method for getting permission of the Federal authorities to erect dams *and other obstructions* on the navigable waters of the country." (emphasis added)

(at p. 1232) between the use of fossil fuel to "elevate water for storage purposes" and the use of fossil fuel to heat water "to drive a turbine" is neither meaningful nor compelled by the legislative history.

The legislative history indicates that Congress was attempting to promote energy production through a rational and comprehensive scheme of water development. This Court should honor that attempt rather than sanction disingenuous distinctions. Since the *Taum Sauk* case, *FPC v. Union Electric Co.*, 381 U.S. 90 (1965) did not squarely face this issue and since the implementation of the *obiter dictum* in that case would produce anomalous consequences, that dictum should not control here.

Intervenors argue that:

> "The quantities of water diverted and used by a steam plant in boilers and cooling apparatus are miniscule compared to the quantities required by a hydroelectric project generating the same quantity of power, and Congress, concerned with the development of water power, had no reason to concern itself with the insignificant quantities of water used by thermal plants." (Intervenors' brief, pp. 46, 47)

The obvious point neglected by the Intervenors is the *totally consumptive* nature of the use of water by the steam plants. At the Colstrip plants, for instance, there are no plans for returning any of the water to the Yellowstone River. The National Academy of Sciences study indicates:

> "Approximately 20,000 acre feet of water per year . . . is consumed annually by a 1,000 megawatt electrical generating plant operating at full

> load and using an evaporative tower for cooling . . .
>
> These figures represent the order of magnitude of the consumptive use of water for energy conversion and it is important to note that even with the use of water-efficient dry cooling towers, coal conversion processes will consume several million gallons per day of water . . . Even these quantities of water are not normally available at coal mine sites in the western United States. In most coal rich areas the local supply of ground or surface water is insufficient to meet the consumptive use requirements in conventional energy conversion processes."[24]

The *consumptive* nature of the steam generators is the factor which renders them, in many ways, more damaging to this country's navigable waterways than any hydroelectric plant. These truly-national waterways, which are being dewatered at the *laissez-faire* whim of the corporations, cry out for some scheme of comprehensive Federal regulation.

In addition to the above, the legislative history of the Federal Water Power Act reveals a distinct populistic attitude on the part of many of the supporters of the bill.

In 1908 and 1909, President Theodore Roosevelt vetoed several specific dam authorizations passed by the Congress under the General Dam Act of 1906. Among the conditions which Roosevelt indicated in his veto message of April 3, 1908, as necessary for his acquiescence were:

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[24] *Supra*, Note 10, p. 101.

> "Third. There shall be a license fee or charge which, although small and nominal at the outset, could be adjusted in the public interest.
> Fourth. There should be provision for the termination of the grant at a definite time, leaving the future to determine its course . . ."[25]

The 1920 bill incorporated these provisions. Furthermore the House Committee on Water Power stated:

> "Section 7 provides that in issuing preliminary permits or licenses the commission may, in its discretion, give preference to applications by states and municipalities provided the plans of same are deemed by the commission *best adapted to conserve and utilize* in the public interest and navigation and *water resources* of the region, and may likewise give preference to the applicant the plans of which it finds best adapted to develop, conserve, and utilize the navigation and water resources of the region."[26] (emphasis added)

Obviously, if the Federal Power Commission is going to limit artificially its jurisdiction to hydroelectric development, this mandate will be impossible to fulfill. The close scrutiny by the Federal Power Commission of a hydroelectric proposal on the Yellowstone River may be meaningless or even counterproductive if a private utility can, without any Federal guidance or control whatever, pirate massive amounts of water from public streams for fossil-fueled electrical production. At least in the *Chemehuevi* situation,

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[25] See: 66th Congress, 1st Session House Committee on Water Power Report No. 61, pp. 2, 3.

[26] Id at 6.

the United States Department of Interior had undertaken some review of the plants in question (albeit, inadequate). At Colstrip, Montana, there has been *no* Federal environmental impact statement prepared on the plants, and little, if any, indirect Federal review.

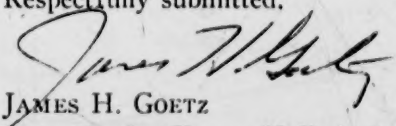
Finally, the giant coal-powered, steam generating plants contemplated for the Northern Great Plains, and now in their infancy at Colstrip, will result in hundreds of miles of transmission lines constructed across the rangeland, carrying locally produced electrical energy to distant, high-consumption regions of the nation. The prospect presents the irony of having enormous acreage of rangeland permanently destroyed or disfigured and the most precious resource of this semi-arid region drained from its rivers, while the beneficiaries of this destruction reside in population centers over a thousand miles away.

Although this Court has stated emphatically that, "there is no question that the interstate transmission of electric energy is fully subject to the commerce powers of Congress," *Union Electric, Supra*, at 94, there arises the strong possibility that no Federal regulatory power will be exercised over the construction of steam generators and attendant transmission facilities in the Northern Great Plains. Unless, in the instant case, the Federal Power Commission jurisdiction is found to embrace coal-fired plants as well as hydroelectric generators, precedent will then lie for the uncontrolled exhaustion of the region's water resources, despite the historic mandate for a comprehensive development policy based on conservation of the limited navigation and water resources of the nation. To base that precedent on the facile distinction between hydroelectric and water-consumptive steam generators will, ironically, gut the fundamental purpose of the 1920 Act.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth by the Chemehuevi Tribe, et al., Trout, Unlimited, et. al., as *amicus curiae* respectfully submit that this Court should reverse the Circuit Court's ruling that fossil-fueled electrical generating plants are not "project works" under the Federal Power Act, and should affirm the Circuit Court's ruling that fossil-fueled electrical generating plants which use surplus water from a government dam are subject to Federal Power Commission licensing jurisdiction under the Federal Power Act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail on the following persons on this ..... day of October, 1974:

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APPENDIX

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TO: Joseph Brecher, Esq.
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BUFFALO RAPIDS IRRIGATION PROJECT, c/o Ed Norlin, Project Manager, Terry, Montana, CUSTER ROD & GUN CLUB, c/o Bryan Schoof, President, Miles City, Montana, TONGUE-YELLOWSTONE BEET GROWERS, c/o Willie Day, C B Route, Glendive, Montana, and TROUT, UNLIMITED, c/o Lawrence Reno, Reno & Judd, 646 Metropolitan Building, Denver, Colorado, state that they are Complainants in Docket No. E 8335 before the Federal Power Commission, that they have asserted in their complaint that the Federal Power Commission has licensing jurisdiction under Part 1 of the Federal Power Act, 16 U.S.C. §§ 791a-823 to license as "project works." steam electric power plants that obtain cooling waters from navigable rivers of the United States (namely, the Yellowstone River in Montana); and that the Federal Power Commission has jurisdiction to license use by thermal-electric generating plants of "surplus

water" from any government dam; that they have a vital interest, therefore, in supporting the position of the Chemehuevi Tribe in the above-entitled action, and, therefore, request the consent of the parties to the filing by Buffalo Rapids Irrigation District et. al. of a brief *amicus curiae* in support of the position of the Chemehuevi Tribe of Indians.

Dated July 10, 1974.

s/JAMES H. GOETZ

JAMES H. GOETZ
15 South Tracy, Suite 8
Bozeman, Montana 59715
Attorney for Buffalo Rapids Irrigation District, et. al.

CONSENT TO FILING OF AMICUS CURIAE BRIEF

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, that the above *amicus curiae* brief may be filed in this proceeding with the Supreme Court of the United States.

s/JOSEPH J. BRECHER

JOSEPH BRECHER

s/NORTHCUTT ELY

NORTHCUTT ELY

s/ROBERT H. BORK

ROBERT H. BORK

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# Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1380

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.,
*Petitioners*

v.

FEDERAL POWER COMMISSION

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL.,
*Petitioners*

v.

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.,

No. 73-1667

FEDERAL POWER COMMISSION,
*Petitioner*

v.

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

### INTRODUCTION

The issue in this case is whether a new technological phenomenon, the energy complex, fits within the regulatory scheme contained in a statute enacted a half century ago,

long before such a development could have been foreseen. A consortium of private power companies is in the process of erecting a network of energy-producing facilities in the "Four Corners" region of the Southwest. The major features of this energy complex are six huge electric generating plants fueled by locally available strip mined coal.[1] These six plants are interconnected by ultra-high voltage transmission lines, which enable them to form one huge power-producing grid to supply load centers in metropolitan areas on the fringes of the Four Corners region. All draw immense amounts of cooling water from the Colorado River system. Two of the plants will draw their cooling water from Lake Powell, which is impounded by the Glen Canyon Dam, a federal reclamation project. The other four depend on upstream government dams for a dependable supply of cooling water. Together, their impact on the flow of that stream is significant.

Electricity is produced by three different methods: steam power, water power, and atomic power. (The latter method is not involved in this case and will not be discussed further.) At a steam power plant, a fossil fuel, such as coal, is used to convert water in a boiler to steam. The expansion of the steam turns a turbine which is then used to generate electricity. Large quantities of cooling water are needed for this process in order to increase the efficiency of the steam expansion process.

Water power, or hydroelectric power, uses the force of water falling over a dam to drive a turbine, which then generates electricity. All six power plants involved in this case are steam plants.

The Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, the Committee to save Black Mesa, and the individ-

[1]The six plants include Four Corners and San Juan, near Farmington, New Mexico; Huntington Canyon, near Price, Utah; Navajo, on Lake Powell, near Page, Arizona; Mojave, at the Southern tip of Nevada; and the Kaiparowits plant, now in the advanced planning stage, to be located somewhere on the Kaiparowits Plateau on the Utah side of Lake Powell.

ual respondents are all residents of the area affected by the Southwest Energy Complex. The Sierra Club is a national organization dedicated to restoring and preserving environmental quality, many of whose members reside in the same area or use it for recreation. (These parties are referred to in this brief as "the Indian respondents.") Dismayed by the major environmental degradation associated with the operation of the six plants and apprehensive that these impacts would increase as the plants expanded, the Indian respondents were shocked to learn that there was no agency, state or federal, exercising any effective regulatory authority over the Southwest Energy Complex.

This, despite the fact that § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), gives the Federal Power Commission jurisdiction to issue licenses "to citizens of the United States . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction. . . ." The same section also authorizes the issuance of a license "for the purpose of utilizing the surplus water or water power from any government dam."

Since the operations of the six plants clearly fall within both of these statutory definitions, the Indian respondents filed a complaint with the Commission, requesting it to order the owners of the six plants to show cause why they should not be required to apply for licenses under the Federal Power Act (App. 1a). The commission, *sua sponte*, dismissed the complaint, alleging that it had jurisdiction over hydroelectric but not over steam plants under the Federal Power Act (App. 22a). After an application for rehearing was denied by the Commission (App. 28a), the Indian respondents appealed to the United States Court of Appeals for the District of Colum-

bia Circuit, pursuant to 16 U.S.C. § 825*l*(b). In a lengthy opinion (App. 38a-112a), the Court of Appeals ruled that the Commission did have jurisdiction to license steam electric plants that use surplus water from a government dam and remanded the case to the Commission to determine whether the six plants were, in fact, using such water, and whether the Commission's jurisdiction was "affected in any way by the jurisdiction of any other federal agency." However, the Court ruled that steam plants were not covered under the project works clause, relying primarily on its reading of the legislative history of the Federal Power Act, prior administrative construction, and dictum to that effect by this Court in *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965). The government and power companies then petitioned this Court for writs of certiorari and the Indian respondents filed a cross-petition on the "project works" portion of the decision. All three petitions were granted by this Court on June 10, 1974.

## SUMMARY OF ARGUMENT

1. Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), authorizes the Commission to issue licenses for the purpose of constructing "project works" for the development of power on any stream over which Congress has jurisdiction. The coverage of the statute is not specifically limited to "hydroelectric" power and the facilities at the six plants involved in the case fall within the definition of "project works." Furthermore, the six plants are indisputably using "surplus water or water power from a government dam" in their operations. Thus, under the literal language of the statute, the six plants are subject to licensing jurisdiction under two separate clauses of the Act.

Under the "plain meaning" rule, there is a very strong presumption that a statute should be interpreted literally, without resort to extrinsic aids such as legislative history, if the statutory language is unambiguous. Only if a literal reading would lead to a result completely at variance with the statutory purposes may the Court depart from the strict language of the statute.

2. Application of FPC licensing jurisdiction to steam plants, far from subverting the intention of Congress, would further a basic purpose of the Federal Power Act — to curb attempts by private power interests to appropriate for themselves the public's valuable resource in the power potential of navigable streams. This was one of the most important objectives Congress had in mind when it passed the Federal Power Act.

3. The legislative history invoked by the government and the power companies does not show that Congress affirmatively intended to limit FPC jurisdiction to water power plants, as opposed to steam plants, forever and under all circumstances. It merely shows that the Congress was not thinking at all about whether steam plants should be regulated

when it enacted the Federal Power Act. Such a showing is insufficient to vary the unambiguous language of a statute.

Congress' failure to consider regulation of steam power plants was understandable because it was concerned with supervising the use of water by the power industry. Since steam plants at that time had virtually no effect on waterways, their regulation would not have been necessary to carry out the statutory purpose. However, technological changes which have made possible the development of today's steam electric energy complexes have rendered that assumption inaccurate. Today, in fact, large steam plants can have a much greater effect on waterways than any hydroelectric facility.

Comprehensive legislation designed to regulate the activities of an industry for the public's benefit is broadly construed by the courts so that new developments which could not have been anticipated by the drafters of the legislation are deemed to be covered by the act, in order to ensure that its general purposes will be carried out. To do otherwise would impose an impossible burden on the Congress: to anticipate and name every conceivable type of activity that should be subject to regulation.

4. None of the other extrinsic factors urged by the power companies and the government compel the conclusion that the statute does not mean what it says. The Commission's interpretation, though long-held, is erroneous, is not supported by an intelligible reasoning process, and is not entitled to the respect accorded to a contemporaneous administrative construction of a new statute. This Court's dictum indicating that the Commission has no jurisdiction over steam plants should not govern in this case. It was reached in a non-adversary context and based on the assumption that steam power plants have no effect on waterways.

5. The court below was correct in its ruling that the six plants are jurisdictional under the surplus water clause. To accept the interpretation of the power companies and the government that the clause applies only to hydroelectric plants would render it nugatory, in violation of a cardinal principle of statutory construction. The term "surplus water" had a definite, established meaning, independent of water power at the time the Federal Power Act was passed and there is no evidence that Congress did not use the term as it was commonly understood.

6. The environmental degradation associated with the operations of the six plants in this case offers an eloquent testimonial to the need to fill the "regulatory gap" under which the siting of steam power plants has escaped federal regulation. The Federal Power Commission, itself, has recommended that it be given precisely the powers that the Indian respondents claim it already has. Whatever difficulties there would be in implementing such jurisdiction under the terms of the Federal Power Act would be more than offset by the advantages to be obtained by following Congress' original intent to achieve comprehensive regulation of the Nation's waterways.

7. The regulatory authority of the Federal Power Commission discussed above is not superseded by the broad water allocation authority of the Secretary of the Interior under the "Law of the Colorado River." The nature and purposes of the powers given to the two agencies are substantially different. Concurrent jurisdiction over various phases of the same project is relatively common in federal administrative law and the courts are cognizant of this phenomenon. Furthermore, the language of the statutes which, it is claimed, ousts the FPC from jurisdiction on the Colorado River actually indicates that Congress specifically meant for that jurisdiction to continue. Administrative actions by both the

FPC and the Interior Department confirm this interpretation. Finally, water for two of the six plants involved in this case are not at all under the jurisdiction of the Secretary, so at the very least the issues remain justiciable as to those two plants.

## ARGUMENT

### I. THE STATUTORY LANGUAGE UNAMBIGUOUSLY GRANTS JURISDICTION; THUS, IT IS UNNECESSARY TO RESORT TO EXTRINSIC AIDS TO CONSTRUCTION.

This case involves the fundamental question of whether a statute should be construed so that it means what it says, or whether highly debatable historical theories and attempts at psychoanalysis of Congressmen in office more than a half century ago will prevail over common sense and the English language. The court below ruled that one clause of the statutory section in question "does indeed mean what it says" (App. 101a), but that another clause does not. The government and the power companies argue that *neither* clause means what it says, citing legislative history that shows Congress never thought about the problem involved in this case, at all. The Indian respondents suggest that speculation about the probable views of an ancient Congress and Commission concerning a technological phenomenon that could not then have been anticipated should not be allowed to override the plain and obvious meaning of the words Congress wrote.

Even if one elects to pursue the will o' the wisp of "legislative intent," one finds that the power companies' activities here are precisely the type of evil Congress had hoped to curb through regulation by the Federal Power Commission. In effect, the power companies argue that they may, by means of the back door, appropriate the public's valuable ownership of an almost priceless resource — the power potential in the Colorado River — because they have discovered a technological means to do so which Congress did not have the foresight to anticipate half a century ago. But Congress used general language in the Federal Power Act so as to avoid this kind of result. The courts, realizing the practical impossibility of drafting *any* regulatory statute so as to an-

ticipate all future technological changes, consistently apply that general language to new developments in the regulated industry.

A. *The statutory language.*

The controversy in this case revolves around the meaning of two clauses of § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). That section authorizes the Federal Power Commission to issue licenses, *inter alia,* for two purposes:

> [F]or the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction. . . .
>
> [O]r for the purpose of utilizing the surplus water or water power from any Government dam. . . .[1]

The term "project works" mentioned in the above paragraph is defined as "the physical structures of a project. . . ." 16 U.S.C. § 796(12). "Project," in turn, is defined as a

> complete unit of improvement or development, consisting of a powerhouse, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part

---

[1]The Federal Power Act provides for enforcement of the Commission's licensing jurisdiction in § 23(b), 16 U.S.C. § 817(b):

> It shall be unlawful for any person . . . for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . . or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of . . . a license granted pursuant to this chapter.

> of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith . . . all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit. 16 U.S.C. § 796(11).

There can be no doubt that the six power plants involved in this case fall within the language of the "project works" clause. The power companies are, in fact, constructing, operating and maintaining the types of facilities mentioned in § 4(e), such as water conduits, powerhouses and transmission lines, for the development and transmission of power across, along, from, or in navigable streams. The statute does not require that the project works be used to generate *hydroelectric* power, but merely "power."

There is virtually unanimous agreement on this point. The court below conceded: "It is true, as petitioners point out, that the literal language of § 4(e) appears to include steam plants" (App. 53a). But the Court of Appeals was convinced that extrinsic factors, such as the Power Act's legislative history, militated against such an interpretation. The government, too, concedes that "the bare words" of the statute "do not themselves conclusively limit that subsection's applicability to hydroelectric power plants" (Brief, p. 15).

Willard Gatchell, former general counsel of the Federal Power Commission, also expressed the opinion that the "project works" clause authorized jurisdiction over steam plants:

> Under this grant of authority, the Commission could issue a license for a steam-electric power plant located on a navigable stream, which utilized the water of such stream for condensing purposes

> and transmitted the power so generated across, along, or from such stream. Also, a power development utilizing steam rather than water power as a generating force could well have most of the physical structures listed in Section 3(11) of the statute in the definition of "project." Thus, there is no express limitation of the licensing authority to hydroelectric power plants as distinguished from steam-electric power plants. W. Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920*, 14 Geo. Wash. L. Rev. 42, 44 (1945).

Only the power companies attempt to argue that steam plants cannot be "project works," asserting that some of the structural and hydraulic features listed in the statutory definition are found only at hydro plants, not steam plants: "The steam plant's water system is keyed to pumps, not turbines, lifting water uphill, not directing it downhill, for consumption in conversion of energy supplied by fuels, not by falling water" (Brief, p. 45). But this Court has already ruled against this position. *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965), held that the Commission had licensing jurisdiction over pumped storage projects. Pumped storage projects, like steam plants, use energy supplied by fossil fuels to pump water uphill. This water is stored in a reservoir, to be released and allowed to run downhill to provide an additional power supply at peak demand periods (App. 80a, n. 98). (It takes about three units of heat energy to produce two units of potential hydro energy at a pumped storage plant. *See Scenic Hudson Preservation Conference v. FPC*, 354 F.2d. 608, 612 (2d Cir. 1965), *cert. denied*, 384 U.S. 941.)

It is equally indisputable that the six plants are using "surplus water from a government dam" for the purpose of developing electric power and the court below so found

(App. 101a). The "surplus water" clause is discussed at Point V of this Brief.

B. *The "plain meaning" rule.*

The "plain meaning" rule has long been a cardinal principle of statutory construction. Indeed, the court below briefly acknowledged the existence of this principle (App. 54a) and then proceeded to ignore it. Perhaps the best statement of this doctrine was made by Mr. Justice Frankfurter in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944):

> We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. . . . To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another.

The opinion went on:

> After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him. 322 U.S. at 618.

*See also Malat v. Riddell*, 383 U.S. 569, 571 (1966); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947); *Helvering v. Hutchins*, 312 U.S. 393, 396 (1941); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936); *Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932).

As we showed above, the language of § 4(e) unequivocally and unambiguously covers steam plants. In an uninterrupted line of cases, this Court has indicated that where there is no ambiguity, there is "nothing to construe." *National Home, D.V.S. v. Wood*, 299 U.S. 211, 216 (1936).

In *United States v. Missouri Pacific R.R.*, 278 U.S. 269 (1929), this Court declined to consider the import of Congressional debates on a bill because:

> . . . Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. 278 U.S. at 278.

*See also United States v. Oregon*, 366 U.S. 643, 648 (1961) and *Connecticut L. & P. Co. v. FPC*, 324 U.S. 515, 527 (1945), in which this Court held that general language in the Federal Power Act favoring state regulation "cannot nullify a clear and specific grant of jurisdiction [to the FPC], *even if the particular grant seems inconsistent with the broadly expressed purpose*" (emphasis added).

Mr. Justice Jackson, in his usual eloquent fashion, explained why the plain meaning rule makes sense:

> I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a

> Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute. *United States v. Public Utilities Comm'n*, 345 U.S. 295, 319 (1953), concurring opinion.

(The majority had entered into an examination of legislative history in *United States v. Public Utilities Comm'n* because it felt the statutory language was ambiguous and also to see whether the literal words would bring about an end "completely at variance with the purpose of the statute." 345 U.S. at 315.)

This principle has been applied by this Court in two decisions that are analogous to the present case. In *Fairport, P. & E. R.R. v. Meredith*, 292 U.S. 589 (1934), this Court was called upon to decide whether the Federal Safety Appliance Act, 45 U.S.C. § § 1 and 9, could be invoked by a motorist who was hit by a train. The train was not equipped with power brakes, as required by the Safety Act. In *Fairport*, as here, it was argued that the Safety Act occupied a narrow field and was "intended only for the protection of employes and travelers upon the railroads, and has no relation to the safety of travelers upon highways or of the public generally." 292 U.S. at 594. There, as here, the literal language of the statute unquestionably covered the fact situation before the Court, and the activity complained of was plainly within the range of evils with which Congress intended to deal (*see* Point II *infra*), but there was some legislative history indicating that Congress may not have believed that the coverage of the statute would extend that far. And there, as here, the title of the statute seemed to restrict its coverage. Nonetheless, the Court ruled that the Safety Act could be invoked by persons other than employees and passengers. Because of the peculiar relevance of the Court's reasoning to the present case, a rather lengthy quotation is in order:

> The contention of petitioner is that the Federal

Safety Appliance Act was intended only for the protection of employes and travelers upon the railroads, and has no relation to the safety of travelers upon highways or of the public generally. Very likely, the primary purpose in the mind of Congress was to protect employes and passengers. So much is indicated by the title — "An act to promote the safety of employes and travelers upon railroads," etc. And this is borne out by the history of the legislation. President Harrison in his first annual message to Congress called attention to the need of legislation for the better protection of the lives and limbs of those engaged in operating the interstate freight lines of the country, and especially the yard men and brakemen, and expressed the view that Congress had power to require uniformity in the construction of cars used in interstate commerce and the use of approved safety appliances upon them.

But we are asked to hold that the title expresses the sole intent of the act, and this involves a question of statutory construction. The title of an Act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity. [citations] But here the words of . . . the act speak plainly and nothing in the nature or operation of the legislation requires, or suggests the necessity of, an appeal to extrinsic aids to determine their meaning . . . [T]he installation and use of power brakes . . . so obviously contribute to the safety of the traveler at crossings that it is hardly probable that Congress could have con-

templated their inapplicability to that situation. 292 U.S. at 594-95.

*Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947) is another case in which this Court opted for an expansive reading of the coverage of a regulatory statute on the basis of its broad language, despite substantial evidence that Congress did not discuss, and therefore presumably did not intend, such wide jurisdiction. The question was whether the National Labor Relations Act ("NLRA") required Packard to enter into collective bargaining with a union made up entirely of foremen. The statute conferred the right to collective bargaining on "any employee." The company contended, however, that foremen more nearly fit into the statutory definition of "employer": "Any person acting in the interest of an employer, directly or indirectly. . . ." Thus, the company reasoned, foremen were not covered by the Act.

This Court first noted that it "is too obvious to be labored" that "foremen are employees both in the most technical sense at common law [and] in common acceptance of the term." 330 U.S. at 488. As for the definition of "employer," which seemed to include foremen and thereby to place them outside the Act's protection, the Court reasoned that *every* employee is required to act "in the interest of the employer." Thus, foremen should not be consigned to the employer category (and consequent exemption from the NLRA) just because they advance the company's interests.

Expressing awareness that foremen, even if they do act for the employer in dealings with manual laborers, "still have interests of their own as employees" (330 U.S. at 489), the Court noted that nothing in the language of the NLRA indicated that Congress had withheld protection for foremen taking collective action to advance those interests.

The Court refused to examine proffered extrinsic aids to interpretation: "There is, however, no ambiguity in this Act

to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law." 330 U.S. at 492.

The dissenters argued that the legislative history (which the majority declined to peruse) strongly indicated that Congress did not want foremen to be covered under the Act. The dissent noted that: "The evil at which the Act was aimed was the failure or refusal of industry to recognize the right of workingmen to bargain collectively." 330 U.S. at 496. According to § 1 of the NLRA, this refusal to bargain had been the cause of strikes and other disruptions. But, the dissenters pointed out, workmen, not foremen and other management personnel, had been aggrieved and were striking. They also noted that the statute was replete with references to "workers" and "laborers," but never mentioned supervisors. 330 U.S. at 497.

Finally, the dissenters argued, if Congress had intended for foremen to be covered, that fact would have been mentioned somewhere in the legislative history. But they found:

> [N]o trace of Congressional concern with the problems of supervisory personnel. The reports and debates are barren of any reference to them, though they are replete with references to the function of the legislation in protecting the interests of "laborers" and "workers." 330 U.S. at 498.

This same sort of "legislative history" is invoked by the government and the power companies. They point out that the Federal Power Act contains several references to water power, but none to steam power. (*See, e.g.*, power companies' Brief, pp. 45-46; government's Brief, pp. 16, 17-18.) And they note that the debates indicated a concern for promoting and regulating hydro plants, not steam plants. (*See, e.g.*, power companies' Brief, pp. 55-56; government's Brief, p. 23.) These are precisely the kinds of arguments rejected by

this Court in the *Packard* case. The teaching of *Packard* is clear: in the face of unambiguous statutory language that appears to include a type of activity within its coverage, a court will not do violence to the plain meaning merely because Congress did not allude to that type of activity specifically in the course of enacting the legislation.

The opinion below conceded the general validity of the Indian respondents' "plain meaning" argument. But the Court of Appeals maintained that, though the statutory language was unambiguous, it was still justified in examining and relying on extrinsic evidence which it believed led to the conclusion that the straightforward interpretation of the statute was inappropriate. It relied on the narrow exception to the "plain meaning" rule for cases in which "the literal words would bring about an end completely at variance with the purpose of the statute," described by the Court in *United States v. Public Utilities Comm'n*, 345 U.S. at 315.

Common sense indicates that this exception would be applicable only rarely, since Congress seldom enacts statutory language whose meaning is "completely at variance" with its intent. Therefore, it appears obvious that anyone seeking to invoke this exception has a heavy burden of persuasion. While the government and the power companies offer a great deal of evidence which, they contend, shows that Congress did not intend to include steam plants in the jurisdiction of the Commission, nowhere do they show how that jurisdiction is "completely at variance" with the purpose of the Federal Power Act. They simply could not do so, for, as the Indian respondents show in the next section, FPC jurisdiction over steam plants would in fact *further* one of the basic purposes of the Federal Power Act.

## II. A MAJOR PURPOSE OF THE FEDERAL POWER ACT WAS TO PREVENT PRIVATE POWER INTERESTS FROM APPROPRIATING THE VALUABLE PUBLIC RESOURCE OF THE POWER POTENTIAL IN NAVIGABLE STREAMS; THAT IS PRECISELY WHAT THE SIX PLANTS IN THIS CASE ARE DOING.

The Indian respondents do not quarrel with the assertion that a primary purpose of the Federal Power Act was to promote the development of hydroelectric (as opposed to steam) facilities (*see, e.g.*, government's Brief, pp. 19-23; power companies' Brief, p. 52, and Supplement, pp. 45S-46S). But that was not the *only* purpose of the legislation. As Arizona Public Service Co., et al. noted in their brief below (p. 24), the early conservationists, who were the strongest backers of the Federal Power Act, were intent on protecting and making sure that the public received adequate compensation for "the valuable asset of water power potential."

The conservationists were particularly anxious to stop the private power interests from appropriating this resource for themselves, without any supervision by or benefit to the public. As the court below noted, they "decried what they saw as a great giveaway of the Nation's water resources to private interests and a callous disregard of the interest of the public in a comprehensive system of water management that would benefit the public at large" (App. 62a). *See also* Note, *Expanding Jurisdiction of the FPC and the Problem of Federal-State Conflict*, 18 Vand. L. Rev. 1847, 1861-62 (1965). Gifford Pinchot, characterized by Arizona Public Service Co. as "the leader of the conservationists" and a "champion of a great cause" (brief below, p. 25), did not mince words on this subject. In one law review article, he wrote:

> Until 1905, when the first steps were taken to bring about effective regulation and control by the government of the right to erect and maintain power

> dams, the custom of Congress to give away these extremely valuable rights continued unbroken. Unless some other interest happened to be after the same power site, all that was necessary was to get a bill introduced in Congress and sit by and watch it pass as a matter of course.
>
> This time-worn habit of Congress to give away the public property was, of course, wholly unnecessary and wholly without excuse. G. Pinchot, *The Long Struggle for Effective Federal Water-Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945).

At various points, Pinchot called private power interests that sought to usurp the power potential in public waters "water power grabbers" (*Id.* at 16), their acts "piracy" (*Id.* at 17), and their objective "plunder" (*Id.* at 18).

The leading scholar on the history of the Federal Power Act describes how this massive pilferage occurred:

> [N]o one can deny the influence and power of an enormous business interest with funds to employ talented, persuasive, lobbying attorneys. For ten years, tremendous pressure was brought to bear upon Congressmen by power companies. It is not to be wondered at. It is the old story. When clever legal representatives of rich corporations could fashion their arguments to play upon those prejudices of legislators built upon theories of state sovereignty or of *laissez-faire*, they were all but invincible. J. Kerwin, *Federal Water-Power Legislation* 8 (1926).

This same theme — a determination to stop the monopolistic power industry from grabbing off the Nation's waterways — runs strongly through the Congressional committee reports on the Federal Water Power Act of 1920 and its predecessors. For example, the court below quotes from the

House report on H.R. 16673, one of the earliest versions of the Federal Water Power Act (App. 63a):

> Experience has taught us that in the past the private monopolization of natural opportunities has not only deprived the general public of their natural right to a proper share of the benefit which should accrue from them, but such monopolization has given to those possessing it a proponderance of influence and of power in our industrial and civic life which is little short of a menace to our institutions.
>
> We have awakened none too soon to the necessity of preserving under public control these great natural opportunities for the creation of wealth, which belong to the public and which could constitute a serious source of danger to equal liberty and fair opportunity if transferred in perpetuity to private ownership.[1]

The report presented data developed during committee hearings showing that a few very large corporations controlled virtually all the water power then in existence. It concluded that the public interest demanded continuing government control over water so that it would not be "developed as perpetual private monopolies."[2]

The report of the House Committee on Public Lands which accompanied the earliest antecedent of the Power Act, H.R. 16673 (the "Ferris bill"), passionately declared that to allow private power companies to appropriate for themselves the

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[1]H.R. Rep. No. 842, Development of Water Power, etc., 63rd Cong., 2d Sess. 11 (1914).

[2]*Id.* at 14. President Theodore Roosevelt, another ardent champion of the conservationist cause, also condemned the "evils of monopoly" by the power companies and urged Congress to "stop giving away the property of the people in the flowing waters." Address vetoing the Rainy River Project (1908), quoted in J. Kerwin, *supra* at 118.

power potential in navigable streams "ceases to be a mistake; it becomes a crime." H.R. Rep. No. 842, 63rd Cong., 2d Sess. 10 (1914). *See also FPC v. Union Elec. Co.*, 381 U.S. 90, 98, n. 11 (1965).

The power companies in the present case are nonetheless succeeding in appropriating this public resource for their own benefit for the purpose of producing electric power; in the process they are actually diminishing the hydroelectric power production capacity of public power facilities. Meanwhile, the agency charged by Congress to prevent this evil blithely asserts that, though the literal language of its enabling statute seems to authorize action, and though it believes that its intervention in such a situation would be a desirable policy (*see pp. 73-74 infra*), it cannot act, because Congress did not mean it to do so.

The six power plants involved in this case will withdraw 250,000 acre feet of water annually, over 2 percent of the flow of the Colorado River, for cooling purposes and projected increases in power plant capacity along that River and its tributaries may ultimately raise this total to 5 percent[3] (App. 52a). Almost none of this water will be returned to the River. Thus, this huge electric power complex will diminish the potential for production of power at federal hydroelectric facilities at Boulder, Glen Canyon, and other downstream government dams by a substantial amount. If ever there was a "need for integration of federal activities of waterways"[4] — the function of the FPC — this is it.

A second major purpose of the Federal Power Act was to secure "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation. . . ." *First Iowa Hydro-Elec. Coop. v.*

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[3]This cooling water is an integral part of the steam electric power production process (*see p. 43 infra*).

[4]United States ex rel. Chapman v. FPC, 345 U.S. 153, 167 (1953).

*FPC*, 328 U.S. 152, 180 (1946). This goal is separate and distinct from that of promoting the development of water power. Indeed, the comprehensive planning responsibility imposed by § 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), may sometimes dictate that "deferral of construction would be more in the public interest than immediate construction. . . ." *Udall v. FPC*, 387 U.S. 428, 449 (1967).

The disastrous impact of the Southwest Energy Complex on the environment and the water economy of the lower Colorado River basin is notorious.[5] The Senate Interior Committee attributed this chaotic situation primarily to the "inadequate planning and coordination" of these activities by the numerous state and federal agencies that were involved.[6] This is the very type of planning and coordination authority Congress thought it was giving to the Federal Power Commission. But because of the Commission's dogmatic and somewhat bewildering refusal to exercise the powers given to it by Congress, poor electric power site planning, of which this case offers a glaring example, will continue. This unnecessary "regulatory gap," which has so far been felt only locally, will rise to the level of national insanity if the present inertia is allowed to continue. As the court below noted, steam electric power plants are expected to be using 600 billion gallons of cooling water a day by the year 2000, an amount equivalent to one-half the total daily runoff of the entire country (App. 50a-51a). The effect of this tremendous water use by steam plants on the power potential in navigable streams is self-evident and so is the proposition that allowing it to continue unregulated flies in the face of Congress' intent.

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[5]*See generally* S. Rep. No. 92-1015, 92d Cong., 2d Sess. (1972); Comment, *The Four Corners Power Complex: Pollution on the Reservation*, 47 Ind. L. J. 704 (1972); Department of the Interior, Southwest Energy Study: Summary Report, pt. 9 (1972). *See also* Point VI *infra*.

[6]S. Rep. No. 92-1015, *supra* at 24.

Once again, we are observing what President Theodore Roosevelt decried when he vetoed a bill to allow a private company to construct a dam on the James River in 1909: "The great corporations are acting with foresight, singleness of purpose and vigor to control the water powers of the country, by trying to place themselves in a 'twilight zone' from any regulation."[7] Quoted in J. Kerwin, *supra* at 122.

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[7]The "twilight zone" mentioned by President Roosevelt has now become a "regulatory gap." *See* the discussion of Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) in Point VI *infra*.

## III: CONGRESS DID NOT CONSIDER WHETHER STEAM PLANTS NEEDED TO BE REGULATED IN 1920 BECAUSE THEIR OPERATIONS HAD NO EFFECT ON THE HYDRO POTENTIAL OF NAVIGABLE STREAMS, BUT FUNDAMENTAL CHANGES IN THEIR METHOD OF OPERATIONS HAVE NOW BROUGHT STEAM PLANTS WITHIN THE RANGE OF EVILS CONGRESS SOUGHT TO REGULATE UNDER THE FEDERAL POWER ACT; UNDER THESE CIRCUMSTANCES, JURISDICTION SHOULD BE CONSTRUED EXPANSIVELY.

### A. *The legislative history shows only that Congress was not thinking about steam plants, at all.*

So far, we have argued that a detailed analysis of the legislative history of the Federal Power Act is unnecessary because jurisdiction over steam plants is conferred by the literal language of the Act and is in harmony with one of its basic purposes. Therefore, this Court need look no further before concluding that the statute should be applied literally.

But even if this Court is persuaded that we must wade through the mass of legislative documents offered for our amusement and delectation, we find that at best they only support the inference that the 1920 Congress was not thinking about regulating the steam plants of that day. As we show later in this point, that was natural because steam plants were then irrelevant to the problem under consideration. With perhaps one exception, there is no evidence that Congress actually meant affirmatively to exclude steam

plants from jurisdiction forever, regardless of changes in circumstances.[1]

The Indian respondents agree with the government (Brief, p. 21) that the Federal Power Act, at the time of its enactment, would have appeared to be "directly" concerned with water power.[2] We also agree that on the rare occasions when the sponsors of the Act mentioned steam power at all, it was only in the context of comparing it with water power (App. 65a). But this is not the same as saying that Congress actively

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[1]The one direct reference to possible steam plant regulation cited by the petitioners is this dialogue at a committee hearing between Calvert Townley, a power company official, and Congressman Taylor of Colorado (government's Brief, pp. 21-22; power companies' Supplement to Brief, p. 43S):

> MR. TAYLOR. You have spoken about the handicaps that are against water power development as compared with steam. The steam plants are not subjected — or will not be subjected, generally speaking — to the governmental regulations that this bill provides for will they?
>
> MR. TOWNLEY. No, sir.
>
> MR. TAYLOR. And they will not be subjected either to the payment of Federal royalties?
>
> MR. TOWNLEY. No, sir.

Townley was one of the leading power company lobbyists. J. Kerwin, *supra* at 241. It would have been passing strange for him to give an expansive reading to the proposed Commission's jurisdiction in view of the power industry's long and bitter struggle against *any* regulation, at all. Taylor, too, was an opponent of federal regulation, and a champion of the policy of making water power dams as attractive as possible to private capital. *See* 51 Cong. Rec. 13680 *et seq.* (1914). Thus, we have here a gratuitous colloquy between two allies opposed to extensive regulation of power companies, who have seized the opportunity to spread their views on the record. There is no evidence that the full Congress knew of, much less approved of, these views. Because of the notorious susceptibility of Congressional hearings to propagandizing, the courts have wisely ruled that statements made at hearings "are without weight in the interpretation of a statute." McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 493-94 (1931).

[2]It is interesting to note that the same sentence quoted for this proposition goes on to express the view that a subsidiary purpose of the Federal Power Act was to achieve "a favorable and stabilizing effect *on the whole power industry*" (App. 67a) (emphasis added).

intended to limit FPC jurisdiction under all circumstances and forever to hydro plants. As we showed in Point I, the "plain meaning" rule establishes the presumption that unambiguous statutory language means what it says. To overcome that presumption, the petitioners must show that Congress affirmatively intended to exclude such jurisdiction.

To paraphrase the language of Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644-45 (1819):

> It is not enough to say that this particular case was not in the mind of [Congress] . . . when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the [statute] in making it an exception.

*See also Ozawa v. United States*, 260 U.S. 178, 195 (1922).

B. *While steam plants in 1920 had no effect on waterways, new technology in the power industry has completely changed the situation.*

It is true, as the court below pointed out (App. 90a), that steam plants in 1920 supplied the bulk of the Nation's power and that those plants were water-cooled. But we submit it was wrong to infer on that basis that Congress intended not to include them within the FPC's jurisdiction because "any legislation intended to regulate comprehensively the interrelationship between the production of power and the efficient management of water resources would surely have taken account of the existence of these water-using steam plants" (App. 90a).

The fact is, however, there would have been no reason for Congress to consider regulating steam plants in 1920 to achieve this result. To all intents and purposes, steam power plants then had no effect on navigable waters. The largest steam plant then in existence was only 60 megawatts, and the total steam generating capacity *for the entire country* was only 8,900 megawatts. Together, the Nation's power plants used a total of 178 million gallons of water per day (App. 86a, n. 111), equivalent to about 199,000 acre feet of water per year.[3] This is less water than the six plants of the Southwest Energy Complex, *alone,* will use.[4]

Aside from the fact that 1920's power plants used so little water, the *way* in which they used it made for a minimal impact on waterways. For they returned virtually all their cooling water to the streams, so that it could be used again for other purposes, such as downstream hydro generation. Also, the steam power plants of those days had to be located near to their load centers, because ultra-high voltage transmission lines, which have since made long distance shipment of power possible, were then unknown. Thus, the imperceptible impact steam plants had on waterways was even further diluted because that impact tended to be spread out evenly across the Nation.

However, in the past decade a technological revolution has occurred in the power industry, which has led to the emergence of an entirely new phenomenon, the energy complex. This revolution was described by an official of the coal company that supplies the fuel to the Four Corners plant.[5] He

[3]There are 325,851 gallons in an acre foot (the amount of water necessary to cover an area of one acre to a depth of one foot). Thus, the daily cooling water used by all power plants in 1920 was about 546 acre feet.

[4]The six plants will consume 250,000 acre feet of water per year (App. 52a).

[5]Testimony of Albert L. Reeves of Utah Construction & Mining Co., coal supplier for the Four Corners power plant, in *Hearings on Problems of Electrical Power Production in the Southwest Before the Senate Comm. on Interior and Insular Affairs,* 92nd Cong., 1st Sess., pt. 1, at 75 (Comm. Print 1971) (hereinafter "Southwest Power Plant Hearings").

commented on the "technological advances . . . based on the economics of scale" achieved by the power plants involved in this suit as a "major breakthrough" in the field of energy conversion. This major change was made possible by three new techniques: the development of new equipment that made strip mining of low-heat value Western coal economically feasible; the design of new types of generating units, much larger than any previously known; and the development of technology to transmit large amounts of electricity over long distances.

Now, several utilities, serving widely scattered load centers, can pool their resources to construct a handful of huge electric power plants at distant locations, convenient to sources of fuel and water. By means of an interconnected network of ultra-high voltage transmission lines, these few plants are able to supply a large percentage of the electricity demand of vast geographical areas.[6] This system results in substantial cost savings to the power companies and has the secondary advantage of shielding the appalling environmental impacts of the energy complex from their urban customers' consciousness. The trend toward clusters of giant power plant units is predicted to revolutionize the power industry. It is estimated that plants of 500 megawatts or more will probably account for 90 percent of the total steam generating capacity in the Nation by 1980.[7]

When several mammoth power stations are located in the same watershed, they can have an overwhelming impact on

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[6]A power company consultant estimated that five of the six plants involved in this suit would supply one-third of all electricity sold by the intervenors in 1980 at load centers that include Los Angeles, San Diego, Phoenix, Tucson, Las Vegas, Salt Lake City, and environs. *See* 1 Southwest Power Plant Hearings, *supra* at 65. For further details on the workings of an energy complex, *see* the testimony of the President of Public Service Company of New Mexico at Southwest Power Plant Hearings, *supra* at 41.

[7]Ass'n of the Bar of the City of New York, *Electricity and the Environment: The Reform of Legal Institutions*, p. II-7 (1972).

the entire stream regimen. The six plants involved in this case will withdraw permanently up to a quarter million acre feet of water annually from the Colorado River system; as we noted above, this is more water than all the steam plants *in the entire country* used in 1920. The six plants are withdrawing more than 2 percent of the River's flow (App. 52a). Projected increases in generating capacity at these and other projected plant sites would raise that total to 5 percent (*Id.*).

The figures on steam plants' use of water nationwide stagger the imagination. As we noted above, in 1970, steam plants with a capacity of 298,000 megawatts (App. 86a, n. 110) used 120 billion gallons of cooling water a day, one-third of the total water used for all purposes (App. 86a, n. 111). By the end of the century, estimates are that steam power plants will use 600 billion gallons of water a day, equal to one-half the total daily runoff in the United States (App. 51a).

Besides the enormous increase in the quantity of water now used by steam plants, the *quality* of that usage has also changed, so as to add further to the impact of their operations on waterways. In arid areas like the Southwest, power plants usually evaporate all the cooling water they withdraw; none of it is returned to the stream. The reason for this is that the cooling process raises the salinity level of the cooling water substantially. In river systems such as the Colorado, where salinity is already a problem, any additional salt load would be intolerable. Therefore, power plants such as those in the Southwest Energy Complex permanently and substantially diminish the total volume of the River, and thus, the hydroelectric power potential at all downstream water power sites.

The net effect of these changes was pointed out by the court below (App. 86a-87a): "Giant complexes such as the Four Corners plant will withdraw (often permanently) such large amounts of water that the power potential of majority

[sic] waterways will be affected adversely *to an extent greater than that of hydroelectric facilities*" (emphasis added).

The legislative history adduced by the petitioners shows only that Congress was not thinking one way or the other about the question of whether steam plants should be licensed. Such a showing is not enough, under the test laid down by Chief Justice Marshall in the *Dartmouth College* case, to vary the plain meaning of the statute. The petitioners are also required to show that if someone had had the prescience to anticipate the development of the energy complex and had asked Congress if it meant to regulate its operations, Congress would have said "no." There is not a scrap of evidence to show such an intent; indeed, in view of Congress' expressed desire to curb the power companies' appetite for free public resources described at Point II, it is highly unlikely that Congress would have deliberately chosen to allow them to help themselves to the capacious feast they are now enjoying, while leaving the public to pick up the whole check.

Congress' failure to consider the need to license steam plants in 1920 was entirely understandable in the light of their miniscule effect on waterways at that time. But because of major technological changes in the power industry, unforeseeable at that time, the impact of steam plants on the Nation's waters is now highly significant. A broad reading of the statute is now required if Congress' aim to curb private power interests' capture of the public's water resource is to be achieved.

C. *The courts construe agencies' regulatory mandates broadly in order to effectuate Congressional policy under new conditions.*

The courts interpret jurisdictional statutes so that independent federal agencies responsible for regulating a significant portion of an industry's activities are given a broad

mandate to bring their regulatory practices into line as the times change.

As Sutherland has noted:

> Legislation is often written in terms which are broad enough to cover many situations which could not occur to mind at the time it is enacted. And so a statute, expressed in general terms and words of present or future tense, will be applied, not only to situations existing and known at the time of the enactment, but also prospectively to things and conditions that come into existence thereafter. 2A Sutherland, *Statutory Construction* § 32, p. 229 (4th ed. 1973).

*See also Johnson v. United States,* 163 Fed. 30, 32 (1st Cir. 1908) (Holmes, J.).

This Court agrees:

> The legislative process would . . . bog down if Congress were . . . required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules. . . . *American P. & L. Co. v. SEC,* 329 U.S. 90, 105 (1946).

*See also Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941; *Carlson v. Landon,* 342 U.S. 524, 542 (1952) and cases cited *ibid.* at notes 36 and 37.

This Court, recognizing the fluid nature of the issues that concern regulatory agencies, such as the FPC, has often construed their statutory authority broadly, so as to take changed circumstances into account. Thus, in *American Trucking*

*Ass'ns, Inc. v. United States*, 344 U.S. 298 (1953), the issue was whether the Interstate Commerce Commission had exceeded its jurisdictional authority by promulgating regulations governing the use of leased equipment by licensed motor carriers.

It was argued that the words "regulation of leasing practices" were not found in the statute and, therefore, the ICC had no authority in this area. This Court held at 344 U.S. 309, 310:

> [We do not think] it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. [citations omitted]

One important reason for construing agencies' jurisdiction broadly is that rapid strides in technology, such as the development of the energy complex, make previous limitations obsolete. For example, in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the question was whether the Federal Communications Commission could assume jurisdiction over cable television. This Court stated:

> Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through

> appropriate administrative control, a grip on the dynamic aspects of radio transmission," that it conferred upon the Commission a "unified jurisdiction" and "broad authority." Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." 392 U.S. at 172-73. [citations and footnotes omitted]

In *National Broadcasting Co. v. United States,* 319 U.S. 190 (1943), the Supreme Court sustained the power of the FCC to issue regulations governing chain broadcasting. Although the statute establishing the FCC limited its jurisdiction to the licensing of individual broadcast stations, this Court approved the agency's regulatory scheme providing for comprehensive and detailed standards for operation of broadcasting networks. The basic standard articulated by the Court for determining the validity of Commission jurisdiction was whether the activity, if unregulated, could "frustrate the purposes for which the Communications Act of 1934 was brought into being. . . ." 319 U.S. at 219.

This Court conceded that the Communications Act of 1934 "does not explicitly say the Commission shall have power to deal with network practices found inimical to the public interest." "But," the opinion continued, "Congress was acting in a field of regulation which was both new and dynamic." The Court described the legislative setting of the 1934 Act, which was remarkably similar to that of the Federal Power Act: "Congress moved under the spur of a widespread fear

that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." And the Court concluded that Congress did not attempt "an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." 319 U.S. at 219.

Indeed,

> [I]t is a general rule in the construction of statutes that legislative enactments in general and comprehensive terms, and prospective in operation, apply to persons, subjects, and businesses within their general purview and scope, though coming into existence after their passage, where the language fairly includes them. *Cain v. Bowlby,* 114 F.2d 519, 522 (10th Cir. 1940), *cert. denied,* 311 U.S. 710.

*See also Newman v. Arthur,* 109 U.S. 132, 138 (1883); *Pickhardt v. Merritt,* 132 U.S. 252 (1889).

The rule in *Cain v. Bowlby* has been applied in any number of situations. *See Jerome H. Remick & Co. v. American Automobile Accessories Co.,* 5 F.2d 411 (6th Cir. 1925), *cert. denied,* 269 U.S. 556 (copyright laws violated by playing tune on commercial radio without permission, even though radio not yet invented when Copyright Act adopted); *Bruce Transfer Co. v. Johnston,* 227 Iowa 50, 287 N.W. 278 (1939) (statute allowing suit against railroads, stages, and car lines held to apply to trucking, though internal combustion engine had not yet been invented at time statute was passed); *Wisconsin Tel. Co. v. Oshkosh,* 62 Wis. 32, 21 N.W. 828 (1884) (statute authorizing incorporation of telegraph company also includes telephone company).

A turn-of-the-century New Hampshire opinion dealt with an earlier transition period in the power industry — a shift from the use of water, as a force to move milling and other machinery by direct mechanical means, to its use in the production of electricity. In *McMillan v. Noyes*, 75 N.H. 258, 72 Atl. 759 (1909), the question was whether a dam built to provide hydro power fell within the terms of a statute giving flowage rights to "a water mill, and a dam to raise the water for working it, and for creating a reservoir of water, and for equalizing the flow of the same. . . ." The court had no trouble concluding that a power plant fit within the definition of "water mill." We take the liberty of quoting the opinion at some length because it deals with so many of the contentions in this case:

> But it is said that the Power Company does not bring itself within the terms of the statute because it is not maintaining "a water mill" in connection with its dam. That it has erected a building, and installed the necessary machinery for the conversion of the water power secured by its dam into electric power, is conceded. The machinery is run by water power, and in the ordinary use of language the establishment might be termed a "water mill"; that is, a mill operated by water power. That the mill in question falls within the literal meaning of the statute is evident. It is argued, however, that the legislative purpose was to encourage the establishment of manufactories operated by water power, that a water mill is a structure where some useful article, or articles, is manufactured by machinery driven by water power, and that electric energy, though conserved for industrial purposes by the application of water power to intricate machinery, is not a manufactured product. If it is admitted that the present flowage act was passed, as its title indi-

cates, for the encouragement of manufactures, the question remains whether the accumulation of electricity for commercial use may not be deemed a manufactured product within the meaning of the statute. That electrical energy was not of much commercial importance 40 years ago, and was not one of the mechanical products which the Legislature then had in mind, is not conclusive evidence that it does not fall within the list of articles whose manufacture the Legislature intended to encourage. A holding that the Legislature intended to limit its encouragement to mill owners who manufactured such articles as were known and used previous to 1868 would plainly be an unreasonable construction of the act, not required by its language, and not supported by the public policy upon which it was based. 75 N.H. at 263-64, 72 Atl. at 762 [citations omitted].

. . . [T]he question here is . . . whether, upon a reasonable construction of the verbally unrestricted language used, in view of the general purposes of the act as applied to the present state of mechanical and scientific enterprises, the generation of electricity by machinery propelled by water power is such a manufacturing enterprise as the Legislature intended to encourage. A negative answer can only result by unreservedly adopting the so-called rule of strict construction, and imputing to the Legislature a purpose to restrict the operation of the act to ancient mills, like the old-fashioned gristmills and sawmills. But existing legislation of a general character, which is not specially restricted, must receive a construction based, in part at least, upon the present state of society, and not entirely upon the long-discarded customs in vogue at the time of its original enactment. To say

> that the only mills covered by the statute are grist-mills and sawmills because anciently there were no other mills or manufactories would be as absurd as to insist that a water mill means a mill run by a primitive water wheel. General legislation is intended to operate in futuro, and ordinarily to apply to new conditions caused by the progress of industrial enterprise. 75 N.H. at 265, 72 Atl. at 763.

The Indian respondents submit that a compelling analogy is offered by the decision in *United States v. Public Utilities Comm'n*, 345 U.S. 295 (1953). The main issue was whether the FPC had rate-making jurisdiction over sales in interstate commerce of hydroelectric power to the Navy and a California county, pursuant to Part II of the Federal Power Act. Section 201(a) of the Federal Power Act, 16 U.S.C. § 824, gives the FPC jurisdiction over interstate transmission and sale of electricity "to extend only to those matters which are not subject to regulation by the States." The utility claimed it was subject to rate-making supervision only by the California Public Utilities Commission, and not the FPC, pointing to § 20 of Part I of the Act, 16 U.S.C. § 813. That section allowed the FPC to set rates for interstate sales of power produced at licensed plants, if the state involved did not do so. Since California had endeavored to regulate rates in this case, the company argued, § 20 precluded Commission jurisdiction.

This Court rejected this reasoning. The Court conceded that Congress probably *did not*, in fact, intend to give the Commission authority to regulate such rates, because the way the power industry operated at that time was such that federal jurisdiction was unnecessary:

> Admittedly, § 20 contemplated state regulation. And it may well be, as indicated by the congressional hearings, that Congress quite frankly chose the local authorities to regulate the bulk of inter-

> state sales of electricity from licensed projects. In fact, a contrary view would have been almost astonishing as an historical proposition, for neither the large interstate operations of electric utilities that have developed during the last thirty years, nor the concomitant desirability of federal regulation, could have been foreseen in 1920. . . . So we may assume that Congress, as a policy judgment, accepted and adapted the substantial tradition of local utility regulation to power production licensed under the federal Act. 345 U.S. at 302-03.

However, the Court noted, Congress' assumption concerning the efficacy of state regulation was incorrect; this Court ruled a few years later that such regulation is an unconstitutional burden on interstate commerce. *Public Utilities Comm'n v Attleboro Steam & Elec. Co.*, 237 U.S. 83 (1927). Thus, § 20 "assumes what Attleboro held did not exist — state authority to reach interstate sales of energy for resale. . . ." 345 U.S. at 304. "But," the Court added, "there is no evidence that this was done with any firm intent to settle with the states a power essentially national." 345 U.S. at 303. The Court noted that the intent of Congress in enacting Part II was to "fill the gap" in rate regulation left by Attleboro, and that there was no hint that Congress intended to leave that gap wide open for licensed hydro power under § 20, but to shut it for power produced by steam generators or unlicensed hydro plants, which are not subject to the apparent exception of § 20.

This case, too, reveals a dangerous "gap," through which the Colorado River is flowing, unregulated, into the hands of the power companies. Here, too, the argument against jurisdiction is based primarily on a legislative history that shows Congress laboring under an assumption that is no longer true. But, as *United States v. Public Utilities Comm'n* shows, when supervening events (*e.g.*, changes in the law or

new developments in technology) prove that assumption invalid, this Court will not permit the power companies to evade regulation. Instead, it will apply the literal language of the statute, in order to effectuate the overall purpose.

The same reasoning was applied by this Court in *FPC v. Union Elec. Co.* (the *Taum Sauk* case), 381 U.S. 90 (1965). There, the issue was whether Congress had intended to subject to FPC licensing requirements only those power plants that had an effect on interstate commerce by navigation, or whether all hydro plants which affected interstate commerce in any way would be covered. The power company noted that the debates on the Federal Power Act were replete with lengthy arguments about navigability, but were silent on other aspects of the commerce power, such as the sale of electricity across state lines. This Court conceded this was true, speculating that the silence might have been due to two factors: the limited construction of the commerce power then prevailing under the rationale of *Hammer v. Dagenhart*, 247 U.S. 251 (1918) [overruled in *United States v. Darby*, 312 U.S. 100 (1941)]; and Congress' reluctance to "inject other constitutional issues into the ongoing debates." 381 U.S. at 105. The Court also noted that a lack of debate on this question was to be expected. The issue then was "largely theoretical," since, until the advent of the pumped storage plant, any hydro plants large enough to serve interstate markets would also have used enough water to affect the flow or level of downstream navigable waters. 381 U.S. at 105, n. 21.

"But," this Court concluded, "the Act which emerged from these debates . . . was couched in terms which reached beyond the control of navigation and forms no support for the proposition that Congress intended to equate the 'interests of commerce' with those of navigation." 381 U.S. at 105-06. Once again, the Court turned to the literal language of the statute to effectuate the broad purpose of Congress, despite legislative history indicating Congress might not have thought the

coverage of the statute needed to be that wide. The *Taum Sauk* case is discussed in more detail at Point IV-C, *infra*.

D. *The FPC has a broad mandate to integrate federal activities relating to the effects of power production on waterways.*

The court below conceded the "undeniable appeal" of this argument, but ruled that it "nonetheless fails" for two basic reasons: this Court's *dictum* to the contrary in *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965) (discussed in Point IV), and the Court's conception of the limited role of the Federal Power Commission. The Court of Appeals declared that "the FPC does not have a broad, abstract mandate either to regulate the electric power industry or to engage in comprehensive planning for the utilization of our major waterways."

But this Court does not agree with this characterization; it has stated that the FPC is the agency which was given broad powers by Congress to put into effect "a general power policy" and to achieve "integration of federal activities affecting waterways." *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 167 (1953). Its "functions and powers," the Court continued, are "comparable to those of the Interstate Commerce Commission in the field of transportation." 345 U.S. at 168. The ICC does have the sort of wide-ranging powers to meet changing circumstances that, according to the opinion below, the FPC lacks:

> The stuff of the process of [rate making] is fluid and changing — the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. *Board of Trade v. United States*, 314 U.S. 534, 546 (1942).

It is true, as the court below points out, that the Federal Power Act does not authorize licensing for non-power related improvements, such as irrigation facilities (App. 89a). But no one is contending that such jurisdiction exists. We merely assert that the use of water from navigable streams *for the purpose of producing electric power* is licenseable.[8] As the court below acknowledged, the use of cooling water by steam plants is an integral part of the power production process itself, necessary to coax more power from the fuel burned:

> This cooling process is a matter not of convenience but of economic necessity. As the steam is exhausted into the condenser and cooled by the water, it condenses to liquid, thus occupying a smaller space than it did formerly and producing a partial vacuum. This vacuum at the exhaust of the turbine permits the entering high-pressure steam to undergo greater expansion, and hence deliver more energy to the turbine rotor, than if it expanded only to the pressure of the atmosphere. Roughly, the over-all efficiency of producing useful work from high-pressure steam can be in the 40 to 50 percent range if the exhaust steam is condensed by use of cooling water, whereas it will be only 30 to 40 percent if the turbine exhaust is directly to the atmosphere. . . . P. Cootner & O. Lof, *Water Demand for Steam Electric Generation* 8-9 (1965). Quoted at App. 91a-92a, n. 128.

The Indian respondents urge this Court to adopt the philosophy of Mr. Justice (then Judge) Holmes in *Johnson v. United States*, 163 Fed. 30, 32 (1st Cir. 1908):

> A statute may indicate or require as its justifica-

[8]It is interesting to note that at least some Congressmen believed that coverage of the Power Act might extend far beyond this range. Senator Thomas: "[T]here is not a man in your State who can build a cow track or a sheep's bridge across one of your streams without coming down here to Washington. . . ." 59 Cong. Rec. 7733 (1920).

tion a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

## IV. NONE OF THE OTHER EXTRINSIC EVIDENCE COMPELS THE CONCLUSION THAT THE FPC LACKS JURISDICTION.

### A. *The Commission's interpretation of the statute is not controlling.*

The court below (App. 74a-75a) and the petitioners (government's Brief, pp. 25-30; power companies' Brief, pp. 53-55) rely heavily on the FPC's construction of the statute. That interpretation should not govern here. First, and most important, this is a question of statutory construction, which has always been recognized as an area uniquely entrusted to the courts. Unlike administrative decisions involving technical facts or policy judgments, where the judicial branch properly defers to agency expertise, the courts do not hesitate to overrule erroneous interpretations of the law. *See Barlow v. Collins,* 397 U.S. 159, 166 (1970); *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 136 (1939); *SEC v. Chenery Corp.,* 318 U.S. 80, 94 (1943); *FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 146 (1940); *NLRB v. Brown,* 380 U.S. 278, 292 (1965).

In *Volkswagenwerk v. Federal Maritime Comm'n,* 390 U.S. 261 (1968), this Court reversed a Maritime Commission ruling that it lacked jurisdiction, based on a narrow reading of its governing statute. Justice Stewart noted:

> . . . [T]he courts are the final authorities on issues of statutory construction . . . and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. . . . The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia. . . ." 390 U.S. at 272. [citations omitted]

The fact that the agency arrived at its erroneous conclusion early on and has clung to it through the years does not thereby convert its previous incorrect interpretation into an accurate statement of the law which binds the courts. "Consistent error is still error." *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 678, n. 5 (1954); *see Nantahala Power & Light Co. v. FPC,* 384 F.2d 200, 206, n. 12 (4th Cir. 1967), *cert. denied,* 390 U.S. 945. In the *Nantahala* case, the appellant pointed out that the FPC had consistently supported its position in its First Annual Report, a 1923 decision, a statement by its chief counsel in another annual report, and Congressional testimony by its solicitor and general counsel. The court observed, "more significant, more precise and more authoritative than the observations of the Commission and its employees is the unadorned language of the Act." 384 F.2d at 206.

A host of other cases apply the general rule that administrative construction of a statute must yield to the plain language and overall scheme. *See American Ship Building Co. v NLRB,* 380 U.S. 300, 316 (1965); *County of Marin v. United States,* 356 U.S. 412, 420 (1958); *United States v. DuPont De Nemours & Co.,* 353 U.S. 586, 590 (1957); *Automatic Canteen Co. v. FTC,* 346 U.S. 61, 74 (1953); *Zuber v. Allen,* 396 U.S. 168, 192-93 (1969).

The Commission's protestations that it lacks jurisdiction over steam plants all were asserted in a non-adversary context in its annual reports, testimony before Congress, and in a formal decision in which no one contended that licensing was required (*see* government's Brief, pp. 25-28). This Court has held that non-adversary determinations do not have the force of law. *Fishgold v. Sullivan Dry Dock & Repair Corp.,* 328 U.S. 275, 290 (1946). This principle applies in general to "uncontested administrative construction" (*SEC v. Sterling Precision Corp.,* 393 F.2d 214 (2d Cir. 1968)) and to the FPC in particular. *Safe Harbor Water Power Corp. v.*

*FPC*, 124 F.2d 800 (3rd Cir. 1941), *cert. denied*, 316 U.S. 663.

Another factor which might have lent authority to the Commission's interpretation is lacking in this case, contrary to the assertion of the court below. The Court of Appeals quoted this Court for the proposition that administrative construction is entitled to particular respect when it "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Dev. Co. v. Electrical Union*, 367 U.S. 396, 408 (1961), quoted at App. 76a. Such a contemporaneous construction "carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings." *Zuber v. Allen*, 396 U.S. 168, 192 (1969). The court below apparently assumed that the First Annual Report by the FPC actually was such a "contemporaneous construction" by the first commissioners. This is not the case. The First Annual Report was put out by the *second* Federal Power Commission, made up of members of the newly-elected Harding Administration. Not only had these men not been instrumental in passing the Federal Power Act, but they were actively opposed to governmental curbs on the private power industry.

The campaign to enact the Federal Water Power Act was a highly partisan struggle between two opposing coalitions. One group consisted primarily of the power companies and other industrial spokesmen, allied with Western legislators who wanted to protect the states' control of water rights against any federal encroachment. The leaders of this group were frequently heard to argue that water power development must be made attractive to private capital and therefore government interference with the profit-making potential of the industry should be held to a minimum. They also often pro-

claimed their belief that the government had no property interest in the waters of navigable streams, and therefore was not entitled to charge for its use. Their eagerness to promote water power development (which had so far been stymied by cumbersome and conflicting statutory requirements) caused them ultimately to acquiesce in the enactment of legislation creating the Federal Power Commission, in order to move the situation off dead center. But at every turn, they pushed for the narrowest possible range of federal jurisdiction and control.

On the other side were the early conservationists and opponents of big business monopolistic tendencies, the erstwhile "trust busters." They also wished to see water power development go forward, but were determined to make sure that the government, in the course of encouraging private capital to develop natural resources, presumably for the public's benefit, did not surrender the public's property to a few wealthy entrepreneurs. These men recalled the gross abuses of the government's giveaway of millions of acres in railroad land grants and coal leases; they were determined that the public's interest in the power potential in navigable streams and the comprehensive development of its waterways would not share a similar fate. Thus, they battled for tight federal supervision over the location and timing of private water power developments, as well as provisions to assure adequate monetary protection for the public by way of annual charges, regulation of rates, and other financial aspects, and the ultimate possibility of recapture of the power site by the government.

The conservationist forces were spearheaded by members of the Wilson Administration and that wing of the Republican Party which had been associated with the Progressive movement of Theodore Roosevelt. The three Cabinet officers who were to make up the first Commission were among the most enthusiastic and skillful supporters of the legislation; they participated extensively in the drafting process. *See* the letters

quoted by the court below at App. 66a-70a, n. 62;[1] J. Kerwin, *supra*, Chap. V. But these men served as commissioners for less than a year. They were swept out of office by the Harding victory of 1920. The officials who replaced these conservationists had diametrically opposing views on the need to rein in the power companies. The leading historian on this subject describes the situation as follows:

> Clearly, the ascendency of the Republican Party during the 1920's tended to weaken the FPC. Essentially opposed to federal regulation, the dominant Republican philosophy was sympathetic to the position of the large power corporations. Albert B. Fall, W. M. Jardine, Hubert Work, John W. Weeks, Patrick J. Hurley, and Ray Lyman Wilbur, all of whom served on the FPC during the 1920's, were conservatives who desired above all to help, not hinder, private power. Under their benevolent direction, the Power Commission became an innocuous service agency, not a regulatory board. D. Swain, *Federal Conservation Policy, 1921-1933* 114 (1963).

Congressman Frank E. Smith of Mississippi, the eminent historian of conservation politics, agrees:

> Throughout the 1920's the federal interest in hydroelectric power development was supposedly under the protection of the Federal Power Commission, the cabinet agency created in 1920. Most of the Cabinet members who served on the commission during this period of its existence were frankly sympathetic to private power interests whenever

[1]Until 1930, when the Federal Power Act was amended so as to make the FPC an independent agency, the Commission was made up of the Secretaries of War, Interior and Agriculture. *See* 41 Stat. 1063 (1920), amended 46 Stat. 797 (1930). (Franklin K. Lane, one of the signers of the letter quoted, was replaced as Interior Secretary by John P. Payne, another conservationist, who actually sat on the FPC.)

> they opposed public power development. The commission exercised no powers of regulation, and probably would have been an outright service agency of the power companies but for the integrity of its secretary, O. C. Merrill. F. Smith, *The Politics of Conservation* 171 (1966).

These were the men who signed the Commission's First Annual Report. To rely on their views as to what the previous conservationist Congress had in mind is akin to asking a fox to help design a burglar alarm system for a henhouse.

As to the *consistency* of the Commission's views, the Indian respondents submit that it actually constitutes bureaucratic inertia, more than anything else. Virtually all the Commission's disclaimers of jurisdiction cited by the government (Brief, p. 26, n. 24) are one-line reassertions of the original Annual Report's conclusion. Stripped of its gaudy plumage of "contemporaneous construction," the Commission's original disclaimer is left to stand on its own merits, which are somewhat less than spectacular. The entire subject of this litigation, FPC jurisdiction over steam plants, which produced an opinion below of more than 70 pages in the Court of Appeals (App. 38a-112a), was disposed of in three declarative sentences (*see* government's Brief, p. 25) without one word of analysis, nor a single supporting authority. One searches in vain for even a hint of the reasoning process which led to this determination. The courts look with deep suspicion on legal opinions which offer "nothing to support the conclusion but the conclusion itself." *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1243 (D.C. Cir. 1972), *cert. denied*, 405 U.S. 1030; *cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

The court below deduced that the Commission's interpretation had received a legislative imprimatur because it had been transmitted to Congress, and there were no complaints from the legislators (App. 76a-77a). *See also* government's

Brief, pp. 26-30. The government also alluded to the fact that the Commission has asked Congress for jurisdiction, but again, no action was taken (Brief, p. 27).

A similar "ratification-by-silence" argument was rejected in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). In that case, the Immigration Service contended that its hearings in deportation cases were not subject to the Administrative Procedure Act. The Service had submitted legislation specifically seeking exemption from the A.P.A. to Congress, but it was not passed. It argued that Congress was therefore aware of the Service's contention, and the fact that it had taken no action disagreeing with that contention made it "at least arguable that Congress was prepared to specifically confirm the administrative construction by clarifying legislation." The Court disposed of this argument in short order: "We do not think we can draw that inference from incompleted steps in the legislative process." 399 U.S. at 47. *See also Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940), in which the Court said, "To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities."

And, as this Court observed in *American Trucking Ass'ns, Inc. v. A. T. & S. F. Ry.*, 387 U.S. 397, 418 (1967):

> The advocacy of legislation by an administrative agency — and even the assertion of the need for it to accomplish a desired result — is an unsure and unreliable, and not a highly desirable, guide to statutory construction. The possibility of its use to prove more than it means may, but should not, deter administrative agencies from seeking helpful clarification of authority or a fresh and specific congressional mandate.

*See also United States v. United Mine Workers of America*, 330 U.S. 258, 281-82 (1947); *United States v. Price*, 361

U.S. 304, 312 (1960); *Rainwater v. United States*, 356 U.S. 590, 593 (1958).

B. *The Taum Sauk case.*

The court below (App. 80a-83a, *see* especially 88a), the government (Brief, pp. 30-35), and the power companies (Brief, pp. 52-53) lean heavily on this Court's dictum in *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965) (the *Taum Sauk* case), to the effect that the Commission has no jurisdiction over steam plants. The general rule is that dicta in previous opinions does not bind this Court. *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972). The peculiar circumstances of the *Taum Sauk* case suggest even more strongly than usual that this rule should govern in this case.

*Taum Sauk*, of course, did not involve a steam plant at all, but a pumped storage plant, which is concededly a hydroelectric facility, although it does possess some of the important attributes of a steam plan (*see p. 12 supra*). Steam plants were drawn into the discussion for this reason: the power company argued that the Commission did not have to apply for a license for the Taum Sauk plant because it was located on a non-navigable headwater of a navigable stream, and would have no effect on interstate commerce by water or navigation. Congress intended to invoke only its power over commerce in navigable waters, and not its plenary power over interstate commerce, in the Federal Power Act, the company asserted. Therefore, the company reasoned, since its facility would have no effect on water commerce, it was not subject to the licensing requirement of 16 U.S.C. § 797(e). This Court rejected this argument, finding that the language of the statute, together with the discerned "breadth of the federal interest in hydroelectric projects expressed in the 1920 act," compelled the conclusion that "the preoccupation of the Commission and the [Congressional] committees with navigation, while not without significance, does not overcome the clear

import of the language and the purposes of the Act." 381 U.S. at 109.

If FPC jurisdiction were held to extend to its pumped storage project on a non-navigable stream, argued the power company, an "anomalous consequence" would result. It would mean that steam plants would also be licenseable because they, like pumped storage plants, generate electricity for sale in interstate commerce, and there would be no logical basis for distinguishing between the two types of plants. But since everyone, most notably including the FPC, the adverse party in the litigation, assumed that steam plants are *not* licenseable, the Commission's jurisdiction must rest on the narrow navigation power, rather than the broader interstate commerce power.

This Court found its way out of the "conundrum" by emphasizing that Part I of the Federal Power Act

> . . . is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission. 381 U.S. at 110.

As the Indian respondents showed above in Points II and III, this distinction is *not* obvious and meaningful, because steam plants, such as those in the Southwest Energy Complex, "will withdraw (often permanently) such large amounts of water that the 'power potential' of majority [sic] waterways will be affected adversely to an extent greater than that of hydroelectric facilities" (App. 87a). This Court proceeded on the incorrect assumption that steam plants do not affect waterways in *Taum Sauk*, because none of the parties had any reason to apprise it of the facts discussed in this brief — the power company, the government, and the court below had

all assumed the lack of FPC jurisdiction over steam plants. As indicated above (Point IV-B), determinations (or in this case assumptions) that are non-adversary in nature do not have the force of law. When important facts were not brought to the Court's attention in a previous case, its holding is not controlling in any subsequent litigation. *Great Northern Ry. v. United States,* 315 U.S. 262, 279 (1942).

We agree with the government that the *Taum Sauk* language does not foreclose "further consideration of the issue presented here," but emphatically disagree with its assertion that its reasoning "warrants at least substantial weight in deciding the present case" (Brief, p. 35). That language is mere dictum, announced by this Court in a non-adversary setting without the benefit of an exposition on the crucial facts brought out in this case. The Indian respondents are entitled to a full day in court on their claim; we urge this Court to consider it now on its merits.

C. *The title and preamble to the Federal Power Act.*

It is argued that the original title and the preamble to the Act show that steam plants were not to be regulated (App. 72a-73a; government's Brief, pp. 16-17). The Act was originally entitled "the Federal *Water Power* Act" and the preamble denotes the statute as: "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal [a previous act], and for other purposes" (41 Stat. 1063).

In general, titles are of little value in statutory construction. In *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519 (1947), the railroad sought to base its restrictive reading of a statute on its title. The Court rejected its argument as follows:

> That the heading . . . fails to refer to all the matters which the framers of that section wrote into the

> text is not an unusual fact. . . . Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner. . . . As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. 331 U.S. at 528-29.

It is obvious that the Federal Power Act does far more than create a commission, provide for the improvement of navigation and development of water power and related uses of public land and accomplish a repeal — the only subjects mentioned in its title. Among other things, the Act gives the Commission authority to conduct investigations on various aspects of power production and transmission (§ § 4(a) and (g)). It outlaws combinations and agreements to restrain trade or fix prices (§ 10). It authorizes the Commission to regulate licensees' rates, service, and issuance of stock under certain situations (§ 20). It grants the power of eminent domain to licensees (§ 21), and confers jurisdiction on district courts to hear license revocation proceedings (§ 26). The Act's preamble, of course, does not refer to all these matters and could not be expected to do so. "[T]o attempt to refer to each specific provision would often be ungainly as well as useless." *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519 at 528 (1947).

These diverse features of the Act, as well as the Commission's incipient authority to license steam plants on navigable streams, are subsumed under the broadly-inclusive last three words of the title, "for other purposes." Words such as these have been read broadly by the courts. *See, e.g., Caminetti v. United States,* 242 U.S. 470, 489 (1917); *Pike v. United States,* 340 F.2d 487, 489 (9th Cir. 1965).

The government acknowledges the validity of this principle, but seeks to escape its force by citing, out of context, additional language in the *R.R. Trainmen* case for the proposition that the title and preamble may still be used as "tools" to vary the plain meaning of the statutory text. The full text reads:

> For interpretative purposes, they [titles] are of use *only when they shed light on some ambiguous word or phrase*. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain. 331 U.S. at 529 (emphasis added).

Again, the "plain meaning" rule governs.

## V. THE COURT BELOW CORRECTLY RULED THAT THE SIX PLANTS ARE SUBJECT TO FPC JURISDICTION UNDER THE SURPLUS WATER CLAUSE.

The court below ruled that the six plants are subject to the jurisdiction of the FPC because they were "utilizing the surplus water or water power from any Government dam." It expressed its belief that this clause, in contradistinction to the "project works" clause, "does indeed mean what it says" (App. 101a). This belief was fostered by two factors. The first was the actual language employed in the clause:

> Initially, it should be observed that the "surplus water" clause does not refer to the licensing of "project works" as does the "constructing, operating, and maintaining" clause. The words "project works" in the latter clause follow the words "for the purpose of," and they are not found at all in the "surplus water" clause even though that clause is introduced by a second "for the purpose of." By their terms, then, the two licensing provisions of § 4(e) encompass different activities, and it does not follow that the limitation of the reach of the "constructing, operating, and maintaining" clause of hydroelectric projects requires reading a similar limitation into the language of the "surplus water" clause. App. 100a-101a.

The second factor was that, unlike the situation with respect to the "project works" clause, the court found little relevant extrinsic evidence on the meaning of the surplus water clause. But what little it found, principally statutes and court cases, evidenced a governmental desire to control both water and water power produced at governmental projects.

The government and the power companies disagree with that conclusion, maintaining that the legislative history

which, they claim, shows Congress' intent not to license steam plants under the "project works" clause is equally relevant to construction of the "surplus water" clause. In addition, the power companies contend, the legislative history indicates that Congress believed that the term "surplus water or water power" really was a synonym for "surplus power." The Indian respondents have already addressed the first proposition in Points II through IV. In this point, we confine our discussion strictly to the surplus water clause.

A. *The construction urged by the petitioners would render the surplus water clause nugatory.*

The government (Brief, pp. 44-50) and the power companies (Supplement to Brief, p. 2S and *passim*) contend that "surplus water or water power" must mean the same thing as "surplus power," because only the use of water from a government dam for the purpose of generating hydro power is covered by the surplus water clause. This proposition, in addition to violating common sense, transgresses against several canons of statutory construction. The most important of these was expressed by this Court in *United States v. Menasche*, 348 U.S. 528, 538-539 (1955): "It is our duty 'to give effect, if possible, to every clause and word of a statute,' [citation] rather than to emasculate an entire section as the Government's interpretation requires." In *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879), Mr. Justice Strong called this a "cardinal rule of statutory construction." *See also United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914).

But if the meaning of the surplus water clause is restricted solely to the licensing of the use of water power from a government dam, there would be created a double surplusage in the statutory language. First, the words "water and" before "water power" would be rendered meaningless, because the only use to be licensed, the development of hydroelectric power, would already be covered by the term "water power."

The Commission, itself, has recognized that surplus water and surplus water power do not mean the same thing. In *California Oregon Power Co.*, 13 F.P.C. 1 (1954), the Secretary of the Interior contended (as the government claims in this case, *see* Point VII) that authority given to him under the reclamation laws of 1906 and 1939 to grant power privileges at government dams superseded FPC jurisdiction at those dams. The Commission observed:

> . . . The 1906 and 1939 Acts authorize the Secretary to lease "surplus power" or "power privilege." These Acts seemingly relate to the sale of electric power or the lease of water power including head and water, but not to the sale or lease of water as such. Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is "surplus water," and, if used for power development, would require a license from this Commission. Thus there is a distinction to be drawn between "surplus power" or "power privilege" in the reclamation laws, and "surplus water" from a Government dam as used in the Federal Power Act; and we are here concerned with surplus water only. 13 F.P.C. at 4.

Second, the petitioners' narrow construction would render the whole surplus water clause redundant. Under their reading, every facility that would be covered under the surplus water clause would *already* be subject to jurisdiction under the "project works" clause. The surplus water clause would therefore add no new subject of jurisdiction. The government attempts to counter this compelling argument by hypothesizing a theoretical situation where the surplus water clause applies but the project works clause does not. It concedes

that any hydro plant located on a navigable stream or on the headwater of a navigable stream which affects downstream navigability would be subject to regulation under the project works clause. *See FPC v. Union Elec. Co.*, 381 U.S. 90, 93 (1965); *Central Maine Power Co. v. FPC*, 345 F.2d 875 (1st Cir. 1965); *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200 (4th Cir. 1967), *cert. denied*, 390 U.S. 945. Project works with no effects on navigation still must be licensed if located on federal lands. *FPC v. Oregon*, 349 U.S. 435 (1955). Furthermore, the *Union Electric* case held that the Commission had "project works" jurisdiction over hydro plants which, though their operations had no effect on navigability, produced power which is ultimately shipped in interstate commerce. The government then is left only with one possible category of hydro plant that would not otherwise be jurisdictional under the project works clause: "a hydroelectric facility located on a non-navigable waterway, on private land, generating electricity solely for intrastate transmission, and in no other way affecting commerce, would require a license if, but only if, it were using surplus water from a federal dam" (government's Brief, p. 58).

While ingenious, this theory is lacking in one important respect — there were no such facilities in 1920 and, to the best of our knowledge, there still are none today. This is so because the federal government would have no constitutional basis for erecting a dam on such a stream, since by definition, neither its power over navigable waters nor its authority to regulate interstate commerce can be invoked. As the law was understood in 1920 (and as it may well be today), the power of the federal government to construct dams was based exclusively on its authority over navigable waters. *See, e.g., United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 72-73 (1913), in which this Court found that since the primary purpose of a government dam was the "legitimate" one of improving navigation, the secondary aim of producing and selling water was permissible. *See generally* 2

*Waters and Water Rights* 5-15 (Clark ed. 1967); *cf. United States v. Grand River Dam Authority*, 363 U.S. 229 (1960). All statutes authorizing federal dams at that time contained at least "a perfunctory reference to navigation as the basis of the specific project." 2 *Water and Water Rights, supra* at 14. The tie-in between federal water projects and the navigation power was considered so fundamental that federal dams were denoted "navigation dams" in some of the forerunners of the Federal Power Act. *See, e.g.*, 57 Cong. Rec. 4632, 4635 (1919), 56 Cong. Rec. 9912, 9913 (1918). Indeed, the power companies recognize the perceived need at the time the Federal Power Act was debated to use navigation as a "jurisdictional peg" to exercise control over water resources (Supplement to Brief, p. 11S).

The government does not point to a single instance of a government dam built before 1920 that was not constructed, at least ostensibly, to aid navigation; we suggest no such example exists. Therefore, its effort to find an application for the surplus water clause which applies solely to hydro (as opposed to steam) plants that would not otherwise be covered by the project works clause fails. The surplus water clause can have independent significance only if construed to cover facilities other than hydro plants.

B. *There is no evidence that Congress intended to give the surplus water clause any construction other than its ordinary meaning.*

In Point I, we discussed the "plain meaning" rule, under which the courts look to the literal language rather than extrinsic sources to construe a statute. In general, the "plain meaning" is to be determined from "the popular or received import of words." *Maillard v. Lawrence*, 57 U.S. (16 How.) 251, 261 (1853). *See also Eyster v. Centennial Bd. of Finance*, 94 U.S. 500, 503 (1877). The courts will not accept a construction that requires a "reading of the words of the

statute in a strained or unnatural sense." *Woolford Realty Co. v. Rose,* 286 U.S. 319, 327 (1932).

To read the words "surplus water or water power" to exclude water and mean only power, we submit, is to bring this case within the reach of *Woolford Realty* — "The metamorphosis is too great to be viewed without a shock." 286 U.S. at 327. The construction urged by the petitioners constitutes a "curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.,* 267 U.S. 364, 370 (1925).

The petitioners base this rather amazing bit of statutory construction on legislative history which, they claim, shows that Congress used the terms "surplus water" and "surplus power" interchangeably. Once again, the Indian respondents point out that legislative history may not be used to vary unambiguous statutory language. This elementary principle has received "consistent adherence" from this Court. *Ex parte Collett,* 337 U.S. 55, 61 (1949). It is especially applicable here, where the purported thrust of the legislative history would do such violence to the statutory language. The surplus water clause "plainly, unambiguously and unequivocally"[1] requires the licensing of water, as well as power. The petitioners ask this Court to look at the legislative history which, they claim, shows that the clause nevertheless is ambiguous and that Congress did not wish the statute to mean what it says. "An inaccurate allegation of ambiguity does not justify the use of legislative history to vary the meaning of clear and unambiguous statutory language." *Montgomery Charter Serv. v. Washington Metro. Area Transit Comm'n,* 325 F.2d 230, 233 (D.C. Cir. 1963).

In any event, that history does not show that Congress failed to recognize the difference between "surplus water"

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[1]Montgomery Charter Serv. v. Washington Metro. Area Transit Comm'n, 325 F.2d 230, 232 (D.C. Cir. 1963).

and "surplus power." A quick look at the language of the various enactments cited in the power companies' Supplement to Brief reveals that, though the two terms often appeared in conjunction, they were never used synonymously. The early statutes cited at pp. 2S-8S all lease the water power that could be derived from the head created by a government dam. They use the term "surplus water" only to measure the quantity of water that could be allocated for this purpose — that quantity not needed to maintain the navigable capacity of the stream. The statutes did not purport to be leasing surplus water. Thus, the bills did not use the terms "water" and "water power" interchangeably.

But even if one disagrees with this conclusion, there is no evidence that Congress referred to these bills at all while drafting the Federal Power Act, much less that the legislature adopted and approved of the purported synonymous usage of the two terms. The bills dealt with leasing power, rather than the regulation of uses of surplus water, as did the Federal Power Act. If we are required to surmise as to possible statutory antecedents of the surplus water clause, it is more logical to look to early statutes in which Congress dealt directly with "surplus water." The first such usage we have found is in the Desert Lands Act of 1877, 43 U.S.C. § 321. That Act authorized reclamation of desert lands by conducting water to them, but reserved for continued public use "all surplus water" over and above that actually used for irrigation and reclamation. It is significant to note that the term "surplus water" had found its way into the statute books well before hydroelectric power was invented.[2]

Congress continued to give "surplus water" its normal meaning in a series of statutes. The most significant of these are codified at 43 U.S.C. § § 521-522. In 1906, Congress

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[2]The first, rudimentary direct current hydroelectric facility was not constructed until 1882, while the first dam exclusively for the production of hydroelectric power was built in 1894. 14 *Encyclopedia Americana* 646 (1972).

authorized the Secretary of the Interior to lease any "surplus power or power privilege at any dam built under the reclamation act for up to ten years." Act of April 16, 1906, c. 1631 § 5, 34 Stat. 117 (1906), 16 U.S.C. § 522. The same Congress that passed the Federal Water Power Act of 1920 indicated clearly that it did not believe that "surplus water" meant the same thing as "surplus power." It concluded that a separate statute, this time authorizing the Secretary to sell *water* not needed for irrigation, was required. Act of February 25, 1920, c. 86, 41 Stat. 451, 43 U.S.C. § 421.

There are other statutes in which the term "surplus water" appears and cannot possibly be taken to include power, as well. *See* 33 U.S.C § 708 (Secretary of the Army may sell surplus water from flood control reservoirs for domestic and industrial uses); 43 U.S.C. § 423 (Secretary of the Interior authorized to rent surplus water temporarily unnecessary for irrigation of lands inside a reclamation project for use on lands excluded from the project as "permanently unproductive").

The Indian respondents submit that it is somewhat chimerical to attempt to ascertain Congress' construction of language it uses in a statute by examining previous statutes employing the same words. But if one engages in this exercise here, one finds that the statutes cited by the power companies do not at all support their view, while those we have cited clearly show that "water" and "water power" have never been deemed to have identical meanings.

The two bills discussed at pp. 8S and 9S of the power companies' Supplement to Brief were never enacted and so are entitled to little weight. Furthermore, the language in the Act of August 22, 1911, ch. 41, 37 Stat. 32, allowing persons to convert "the power created with the surplus water not needed for lockage . . ." does not support the inference that power and water are the same. Indeed, it recognizes that power is created *with* the water. The bill introduced by Sen-

ator Jones, described at Supplement, p. 9S, contains neither the words "surplus water" nor "surplus power" and so, is not helpful.

The Adamson bill, H.R. 16053, introduced in 1914, is discussed at the Supplement, pp. 10S-22S. Although it is described as a forerunner of the Federal Water Power Act, it does not furnish a reliable guide to Congress' intent concerning the "surplus water" clause that ultimately emerged as § 4(e) of the Federal Water Power Act. The bill was vigorously opposed by conservationists as one "much more favorable to the water-power interests than to the public interest." Gifford Pinchot, quoted in J. Kerwin, *supra* at 181. It contemplated *leasing* of water power developed by surplus water, only. It did not purport to *regulate* any use of water, as did § 4(e) of the 1920 Act. Thus, it was natural that legislators, in discussing the bill, spoke only of the use of water in connection with production of hydro power, and not any other use. The bill was not designed to deal with water resources in any connection other than hydro power, at all. The concept of water resource planning was not introduced until later in the series of bills that ultimately led to the Federal Power Act. The same may be said about the bills introduced in the 64th Congress (discussed at Supplement, pp. 29S-36S) — they were designed only to implement a procedure to lease power from government dams, not to regulate and coordinate water power development.

But the Federal Water Power Act, as it finally emerged, incorporated a large policy change (leasing was supplanted by regulation) and a whole new concept — multiple purpose water resource planning — had been added. This concept was the central theme of a 1917 act creating a Waterways Commission which was to gather information and formulate "a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purpose of navigation and *for every useful purpose*" (empha-

sis added). Act of August 8, 1917, ch. 49, 40 Stat. 250, 269. Because of the exigencies of the First World War, the Waterways Commission members were never appointed. Instead, the FPC took over its water resource planning functions. This is clear from the Congressional debates. Rep. Humphries, an opponent of federal regulation, proposed that the regulatory authority of the Power Act be given to the Waterways Commission. Rep. Esch, a member of the water-power committee that had reported out the House version of the bill, did not believe the moribund Waterways Commission should do the job and noted the advantages of having men of cabinet rank on the Commission. He pointed out that the FPC, too, would be able to make investigations necessary for water basin planning: "Therefore [the Federal Power] Commission would do the work which was to have been done by the Waterways Commission, but the giving of the power prescribed in this bill makes it less necessary for us to create the personnel of the Waterways Commission." 59 Cong. Rec. 9658 (1920).

That multiple use water resource planning is an important part of the Federal Power Act may be seen by the language Congress inserted into and deleted from the Act. First, it emphasized that the Commission was to consider other water uses besides power in § 10(a) of the Federal Power Act, 16 U.S.C. § 803(a). A project must be best adapted to "a comprehensive plan for improving or developing a waterway . . . for the improvement and utilization of water-power development, *and for other beneficial public uses, including recreational purposes* . . ." (emphasis supplied). Second, it substituted the term "government dam" for "navigation dam" in the surplus water clause in order to make clear that all water uses at government dams, not merely navigation, would be included in the Act's coverage. *See* Supplement to Brief, p. 50S.

Third, and most important, was the change from "surplus water *and* water power" to "surplus water *or* water power" in

the statutory language. The power companies admit that "it is not clear why this change was made . . ." (Supplement, p. 39S). The Indian respondents submit that it is logical to assume that Congress deliberately altered the statutory language from the conjunctive to the disjunctive to emphasize that two different things were being regulated — the use of either surplus power *or* surplus water.

We do not believe it would be useful to enter into an analysis and refutation of all the voluminous legislative material presented by the power companies. Not one word of it deals with the issue in this case — whether Congress intended to regulate the use by steam plants of cooling water from government dams. Taken in its most favorable light, it merely shows that some of the predecessor statutes to the Federal Power Act might have restricted the meaning of "surplus water" to surplus water used for hydroelectric purposes in the context of a federal leasing scheme. But the Act as finally adopted was a *regulatory* statute encompassing a broad range of water resource planning objectives not included in the previous leasing statutes. There is ample evidence that the words "surplus water" had a well-established legal significance, independent of "water power," and that Congress was aware of this meaning when it chose to differentiate "surplus water" from "water power" in the statute. All three judges in the court below concluded there is no "useful" legislative history, but that what little extrinsic evidence there is tended to confirm the literal interpretation of the statute (App. 101a).

We submit that the legislative history is therefore ambiguous. Under these circumstances, this Court must "look primarily to the statutes themselves to find the legislative intent." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413, n. 29 (1971). *See also NLRB v. Plasterers' Local Union*, 404 U.S. 116, 128-29 (1971). And, as we have shown above, the literal language of the statute incontrovertibly covers the six plants in this case.

## VI. PUBLIC POLICY CONSIDERATIONS SUPPORT FEDERAL POWER COMMISSION JURISDICTION.

As the Indian respondents pointed out in Point II, the Federal Power Act is designed to protect the public interest by means of a comprehensive regulatory scheme. Because of the narrow construction of the statute adopted by the Commission, that interest is being neglected. The six plants involved in this case are a prototypical environmental nightmare. The public clamor they caused prompted the Senate Interior Committee to conduct five days of field hearings in 1971. During those hearings, a New Mexico Senator described the Southwest power complex as producing "unprecedented pollution";[1] the Supervisor of the New Mexico Air Quality Control Program indicated New Mexico citizens were "aroused" by excessive emissions from the Four Corners plant and that his agency would "hold the company's feet to the fire" to meet new, stricter air pollution standards;[2] the director of the Air Pollution Division of the Clark County, Nevada District Health Department announced that the Mohave plant "was constructed without adequate consideration of the potential effects of its emission . . ." and did not comply with local air pollution regulations;[3] the governor of Utah indicated that his state would "unequivocally" turn down any new power plant, despite the great need for additional income there, if its emissions equalled those at the Four Corners plant;[4] and a member of the Colorado Air Pollution Control Commission indicated that air pollution associated

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[1] *Hearings on Problems of Electrical Power Production in the Southwest Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess., pt. 1, at 5 (Comm. Print 1971) (hereinafter "Southwest Power Plant Hearings").

[2] 1 Southwest Power Plant Hearings, *supra* at 27.

[3] 2 Southwest Power Plant Hearings, *supra* at 768, 769.

[4] 3 Southwest Power Plant Hearings, *supra* at 892.

with the Southwest Energy Complex, even with controls, is "especially dangerous to health."[5]

The Committee issued a report, based on those hearings,[6] that contained the following conclusions: the plants are "major sources" of air pollution, which have measurably degraded air quality in the Southwest. Development of proposed additional plants will probably result in further degradation.[7] The report also found serious environmental impact from strip mining for coal burned at the plants which was not receiving adequate attention;[8] as well as water quality problems.[9] The report attributed these problems primarily to inadequate planning.[10]

In response to the public outcry over these plants, the Interior Department conducted a massive interdisciplinary study of their environmental effects.[11] That study revealed that all six plants would violate applicable air quality standards,[12] and that these emissions were causing "severe reductions in visibility."[13] 48,000 acres would be strip mined to fuel the plants.[14] Almost 21,000 acres would be disturbed by

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[5]4 Southwest Power Plant Hearings, *supra* at 1139.

[6]S. Rep. No. 92-1015, 92d Cong., 2d Sess. (1972).

[7]*Id.* at 31. The Environmental Protection Agency has concluded that the Four Corners, San Juan, and Navajo power plants are exceeding national primary (health related) ambient air quality standards for sulfur oxides and has ordered the power companies to install scrubbers to control those emissions. *See* 38 Fed.Reg. 7554 (March 23, 1973); 39 Fed.Reg. 10582 (March 21, 1974).

[8]*Id.* at 35-36.

[9]*Id.* at 39.

[10]*Id.* at 24.

[11]Department of the Interior, Southwest Energy Study: Summary Report (1972).

[12]*Id.* at 9-5 and 9-12.

[13]*Id.* at 9-14.

[14]*Id.* at 9-25.

transmission lines.[15] It also noted: "Better siting of future plants could reduce the adverse visual impacts of the power-plants (e.g., Navajo plant located adjacent to a spectacular scenic and recreation area)."[16] (For a description of the plants' effect on water, *see* Point III.)

These problems are magnified enormously on the national level. The court below noted that steam power plants contribute 25 percent of all nitrogen oxides and particulate matter, and 50 percent of all sulfur oxides emitted nationally (App. 51a-52a). It also pointed out their enormous impact on water resources (App. 50a-51a). *See* Point III.

The Court of Appeals found that the problems of power plant siting, remarkably, were not covered by existing statutes and regulations. The court below found it somewhat anomalous that the FPC's jurisdiction has not included steam plants, which generate "over 80% of the electricity produced in the United States and utilize large quantities of water in doing so" (App. 92a). The opinion continued:

> In this age of pervasive federal regulation and of heightened awareness of environmental considerations, it is difficult to comprehend that there should be no federal agency or policy governing the siting and operation of fossil-fueled steam plants. One looks in vain through an array of state and federal legislation for a unified, comprehensive regulatory scheme governing power plant siting. App. 93a.

Thus, the court detected a serious "regulatory gap" involving steam power plants.

This Court has not hesitated to construe the Federal Power Act so as to fill such gaps in order to carry out Congressional policy. In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672

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[15] *Ibid.*

[16] *Id.* at 9-27.

(1954), the question was whether the Commission could regulate prices charged by an "independent," local, natural gas producer who sold to interstate pipeline companies at its production fields. The operative jurisdictional statute was § 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), which provides in part:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale. . . .

But § 1(b) specifically states that FPC jurisdiction does not extend to:

> [A]ny other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution *or to the production or gathering of natural gas.* (emphasis added)

Despite this statutory language, the Court determined that Phillips' prices were subject to regulation. It reasoned that the "producing or gathering" exemption did not extend to producers' sales to interstate pipeline companies. The Court indicated that an important policy consideration played a major part in its decision. Regulation of such sales, the Court concluded, was essential if the purposes of the Natural Gas Act were to be carried out:

> All the gas sold in these transactions is destined for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas

> including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed. 347 U.S. at 680.

This Court identified an "overriding" purpose behind the Natural Gas Act — to plug a "gap" in the regulation of natural gas companies because of several court decisions holding that federal regulation of wholesale prices of gas moving in interstate commerce was unconstitutional. Two committee reports specifically referred to the need to eliminate this hiatus. "Thus," the Court concluded, "we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems." 347 at 758.

The *Phillips* decision caused a major turmoil in FPC practice, extending its jurisdiction into a vast new area, with absolutely no Congressional guidelines concerning how that jurisdiction ought to be exercised. As this Court later candidly admitted, the Commission was forced to labor "with obvious difficulty to regulate a diverse and growing industry under the terms of an ill-suited statute." *Permian Basin Area Rate Cases,* 390 U.S. 747, 756 (1968). The result was "the outstanding example in the federal government of the breakdown of the administrative process." *Id.,* 390 U.S. at 758.

The rationale of the *Phillips* decision applies in this case, but the burden on the Commission will not be anywhere near as severe. Here, as in *Phillips,* the statutory scheme calling for a unified, orderly system of regulation cannot be implemented completely unless jurisdiction is extended, in this case, to all power plants whose operations have a significant impact on navigable waters. Here, too, Congress intended to close a significant legal gap in order to effectuate a comprehensive plan for regulating water development, rather than gas prices. This Court noted the existence of the "gap" filled

by the Federal Water Power Act: "Prior legislation . . . was thought inadequate, for it accommodated only the federal interest in navigation." *FPC v. Union Elec. Co.*, 381 U.S. 90, 98-99 (1965).

But, unlike the turmoil created by the *Phillips* decision, an extension of jurisdiction here could be handled smoothly by the Federal Power Commission. The FPC has been consistently on record as favoring extension of its jurisdiction to steam plants. On July 1, 1969, two FPC Commissioners proposed the enactment of the "Electric Power Coordination Act of 1969," subsequently introduced as H.R. 12585, proposing that the Commission be given such authority. In 1971, two plant siting bills calling for such jurisdiction (H.R. 6971 and 6972, 92d Cong., 1st Sess. (1971)) were introduced at the request of the FPC. Chairman Nassikas testified:

> We have recommended . . . that the Federal Power Commission be designated by statute as the federal certifying agency [for power plant siting] for the following reasons:
>
> 1. There would be no division of authority and responsibility so that accountability for timely construction of electric power generating and transmission facilities would be clearly defined.
>
> 2. Such designation would be consistent with the Federal Power Act which has delegated to the Federal Power Commission the primary federal responsibility for improving regional bulk power supply. Section 202(a).
>
> 3. The matter of plant siting and certification of bulk power supply facilities is a logical administrative extension of this primary responsibility for improving regional bulk power supply. Section 2(f), 4(a), and 7(a) [of H.R. 5277] expressly recognize the Com-

> mission's administratively established reliability program pursuant to § 202(a) of the Federal Power Act....
>
> The Commission, as an instrumentality of the Congress, now administers the nation's basic electric energy statute, the Federal Power Act. Adequacy and reliability of electric power supply are among the most basic of the purposes of that Act. They are also the objective of power plant siting legislation.
>
> Assignment of this certification responsibility to the Federal Power Commission would serve to maximize the effectiveness of the expertise which this Commission and its staff have accumulated in electric power matters in the 50 years of the Commission's existence. . . . Hearings on H.R. 5277 and Related Bills Before the Subcomm. on Communications and Power of the House Comm. on Interstate & Foreign Commerce, 92d Cong., 1st Sess., pt. 1 at 426-427 (Comm. print 1971).

The government seeks to undermine the obvious public policy advantage inherent in FPC regulation over steam plants by posing a series of questions concerning how that regulation would be implemented. These questions, it asserts, are not answered by the existing statute because "it was not designed to apply to the steam-electric industry" (Brief, p. 41). Thus, it infers, Congress could not have intended steam plants to be covered.

A similar argument was rejected by this Court in *Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947). There, the question was whether foremen were "employees," who were entitled to collective bargaining protection under the National Labor Relations Act (NLRA). The dissenters argued that foremen were actually closer to being "employers" than "em-

ployees." They pointed out that "foremen were the arms and legs of management in executing labor policies." 330 U.S. at 496. If foremen were accorded a dual employer-employee status, they reasoned, there would be a serious conceptual problem — the same act by a foreman could be both an unfair labor practice attributable to management and also part of his activity as an employee, with which "the employer can interfere only at his peril." 330 U.S. at 497.

The dissent maintained:

> . . . The complications of dealing with the problems of supervisory employees strongly suggest that if Congress had planned to include them in its project, it would have made some special provision for them. But we find no trace of a suggestion that when Congress came to consider the units appropriate for collective bargaining, it was aware that groups of employees might have conflicting loyalties. Yet that would have been one of the most important and conspicuous problems if foremen were to be included. The failure of Congress to formulate a policy respecting the peculiar and special problems of foremen suggests an absence of purpose to bring them under the Act. [footnote omitted]. 330 U.S. at 498.

The majority in the *Packard* case conceded that the application of the NLRA to foremen was a particularly difficult policy question which should be left up to the Board. But the Court noted: "We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute." 330 U.S. 493. As this Court has indicated in *Permian Basin Area Rate Cases,* 390 U.S. 747, 756 (1968), the fact that a statute may be in part "ill-suited" to regulation of a particular phase of an industry does not justify a construction denying jurisdiction.

## VII. FEDERAL POWER COMMISSION JURISDICTION HAS NOT BEEN OUSTED BY THE "LAW OF THE RIVER".

The court below concluded that certain statutes granting to other officials such as the Secretary of the Interior wide powers to control water projects (such as the Boulder Canyon Project Act, 43 U.S.C. § § 617-17a) may have "diluted Commission authority" to license those projects. (App. 110a). Accordingly, the court held that the Commission should consider on remand "whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency" (App. 112a).

The power companies maintain that the Boulder Canyon Project Act and other statutes, regulations, and treaties have in effect vested plenary control over all activities using the waters of the lower Colorado River in the Secretary of the Interior, to the exclusion of the possibility of regulation by the Federal Power Commission (Brief, Point I). They contend further that this issue should be determined judicially, not by the Commission, since this is a purely legal question, dealing with statutory interpretation (Brief, p. 22). The Indian petitioners agree that it is appropriate for this Court to take this matter up now.

But we cannot concur in their assertion that the failure of the court below to examine this question rendered its opinion advisory, and therefore reversible. The Court of Appeals could hardly be faulted for not ruling on the issue, since it was not even mentioned by the government or the intervenors until after the decision was announced. A claim raised for the first time in a petition for rehearing need not be decided by a lower court and, indeed, this Court usually will not consider such a contention either. *See American Surety Co. v. Baldwin*, 287 U.S. 156, 164 (1932). However, under the circumstances of this case, we believe it is appropriate for this Court to dispose of this issue now, in order to avoid

further litigation on remand and a likely second appeal. For the reasons discussed below, we believe this Court should instruct the Commission that its licensing jurisdiction over all six power plants is unimpaired by the authority given to the Secretary on the Colorado River.

The Indian respondents agree with the power companies that the allocation of consumptive uses of Colorado River waters is governed by the "Law of the River." Various statutes, compacts, treaties, contracts and court decrees subsumed under that nomenclature govern the competing claims to use of that water. But we do not believe that the discretionary water allocation powers given to the Secretary of the Interior by the "Law of the River" in any way supersede the regulatory duties of the Federal Power Commission.

This Court made clear the nature of the Secretary's powers to enter into water storage and delivery contracts pursuant to § 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d: he was, in essence, to take over the functions of state water allocation agencies on behalf of the federal government, performing those allocation functions in a highly discretionary manner, limited only by the very general guidelines of the Project Act. In *Arizona v. California*, 373 U.S. 546, 580 (1963), this Court announced:

> [T]hat Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water.

This allocation power completely superseded state laws on the subject:

> [I]t is the [Boulder Canyon Project] Act and the Secretary's contracts, not the [State] law of prior appropriation, that control the apportionment of

> water among the States. Moreover . . . we hold that the Secretary in choosing between users within each State and in setting the terms of his contracts is not bound by these sections to follow state law. 373 U.S. at 586.
>
> [W]here the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place. *Id.* at 588.

As Dean Frank Trelease commented in an often cited article:

> [T]he Secretary will control and distribute water, and the water will be used, in complete disregard of the state laws relating to these actions. F. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation,* 1963 Sup. Ct. Rev. 158, 193.

Thus, the contracting authority of the Secretary of the Interior over Colorado River waters is the functional equivalent of the jurisdiction exercised by state water rights agencies over those waters before Congress took over jurisdiction for the federal government.

The Federal Power Act contemplates a shared authority between water allocation agencies and the Commission. Section 9(b) of the Power Act, 16 U.S.C. § 802(b), requires an applicant to furnish "satisfactory evidence that the applicant has complied with the requirements of the laws of the State . . . with respect to bed and banks and to the appropriation, diversion, and use of water for water purposes. . . ." And § 27 of the Power Act, 16 U.S.C. § 821, states that the Act shall not be construed so as to interfere with State laws relating to "the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

These statutory provisions completely negate the argument that the existence of a water allocation agency with broad discretion somehow ousts the FPC from jurisdiction. They show instead that Congress had intended for the Commission to work in a coordinated manner with the allocation agency, each within its own area of authority. But when State statutes or regulations concerned with the allocation of water conflict with the views of the Federal Power Commission on whether a project should be licensed, the latter agency must prevail. *See First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946); *FPC v. Oregon*, 349 U.S. 435 (1955). The Indian respondents submit that the role of the Secretary vis-a-vis the FPC is akin to that of the states, as described in the *First Iowa* case:

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two co-operating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. 328 U.S. at 167-68.[1]

However, unlike the states, which do not have a veto over FPC-approved projects [*see* C. Meyers, *The Colorado River*,

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[1] *See also* FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 252 (1954) in which this Court noted that the Federal Power Act "merely imposes . . . the additional obligation of using [water rights] in compliance with the Act."

19 Stan. L. Rev. 1, 61 (1966)], the Secretary *does* have such a veto power, since Congress has given him virtually absolute jurisdiction to allocate the waters of the Colorado. Thus, no power project could go through unless the Secretary had first agreed to allocate water to it by contract.

The Federal Power Act contemplates active participation in the decision-making process for federal agencies other than the FPC. Section 4(e), 16 U.S.C. § 797(e), provides that issuance of a license for a project on public lands and "reservations"[2] is subject to such conditions as the supervising federal agency deems necessary for protection and utilization of the reservation and must be consistent with the purposes for which the reservation was founded. The next proviso of the same section gives the Chief of Engineers and the Secretary of the Army a veto over any license that would affect the navigable capacity of navigable streams.

It is not a proper inference that by giving the Secretary power over the allocations of waters from the Boulder Canyon Project (43 U.S.C. § 617d), Congress thereby intended to divest the FPC of jurisdiction over power produced through the use of such waters (power companies' Brief, pp. 20, 23). The power companies assert, without citing any authorities, that somehow the Boulder Canyon Project Act partially repealed the Federal Power Act as it applies to the Colorado River. This Court recently reaffirmed the "cardinal rule . . . that repeals by implication are not favored." *Morton v. Mancari*, ___ U.S. ___, 41 L.Ed.2d 290, 300 (Nos. 73-362 and 73-364, June 17, 1974), quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). *Mancari* announced the rule that:

> In the absence of some affirmative showing of an intention to repeal, the only permissible justifica-

[2]"Reservations" include national forests, tribal lands on Indian reservations, federal land withdrawn from private appropriation under the public land laws and any interests in lands "acquired and held for public purposes." 16 U.S.C. §796 (2).

> tion for a repeal by implication is when the earlier and later statutes are irreconcilable. *Ibid.*

As we have shown, broad delegation of authority to the Secretary is not at all irreconcilable with continued regulatory activity by the FPC. And the language of the Boulder Canyon Project Act, far from manifesting an "affirmative . . . intention to repeal," inescapably shows that Congress meant for FPC jurisdiction to continue. The last paragraph of § 6 of the Project Act, 43 U.S.C. § 617e, provides:

> The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries . . . until this subchapter shall become effective.

The Boulder Canyon Project Act has been effective since June 25, 1929 (46 Stat. 3000). Thus, Congress unequivocally demonstrated that it wanted the FPC to continue to exercise its jurisdiction on the Colorado River, after a temporary interruption.

The other major piece of legislation relied upon by the power companies also compels the conclusion that the FPC retains jurisdiction. The Colorado River Basin Project Act, 43 U.S.C. § § 1501, *et seq.*, like the Boulder Canyon Project Act, gives the Secretary of the Interior the power to allocate waters from a major federal project (in this case, the Central Arizona Project). And, as it did in the Boulder Canyon Project Act, Congress expressed awareness of and confirmed FPC jurisdiction over the Colorado River. 43 U.S.C. § 1555 provides: "Part I of the Federal Power Act shall not be applicable to the reaches of the main stream of the Colorado River between Hoover Dam and Glen Canyon Dam until and unless otherwise provided by Congress." Obviously, Congress believed that FPC jurisdiction continues on the rest of the River, or this specific withdrawal of authority would have been unnecessary.

The power companies complain that the Commission would be relegated to the role of a superfluous "mother-in-law, cooking in the Secretary's kitchen," if its jurisdiction on the Colorado is confirmed (Brief, p. 38). In fact, the two agencies have very different roles to play. These roles are not in conflict. The Secretary's function is legislative in nature — he must allocate Colorado River water among the states and among competing uses within the states. *Arizona v. California, supra* at 580. The Secretary's activities are subject to the give-and-take of political considerations,[3] as irrigation, municipal, industrial, and recreational interests seek to persuade him of the advantages of awarding contracts for the scarce water to them.

The Federal Power Commission, on the other hand, is an independent agency which conducts quasi-judicial regulatory proceedings in the context of a broad responsibility for nationwide planning of water resource and power development. Unlike the Secretary's activity, which is largely discretionary,[4] the substantive and procedural factors governing the FPC's decision-making process have been meticulously detailed in the Federal Power Act, a comprehensive set of regulations, and various judicial decisions.

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[3]Arizona v. California, 373 U.S. 546, 626, 629-30 (1963), dissents of Justices Harlan and Douglas.

[4]This Court has noted the "broad power" Congress has delegated to the Secretary. Arizona v. California, *supra* at 585. In the same opinion, this Court continued:

> We have held that the Secretary is vested with considerable control over the apportionment of Colorado River waters. . . . While the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of his own. This choice, as we see it, is primarily his, not the Master's or even ours. . . . *Id.* at 593.

Dean Trelease has commented that "the Secretary's discretion is limited only by the vaguest of standards. . . ." F. Trelease, *Arizona v. California: Allocation of Water to People, States, and Nation*, 1963 Sup. Ct. Rev. 158, 195. Indeed, the dissenters in Arizona v. California thought that the "delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts." 373 U.S. at 626.

One of the main substantive policies embodied in the Federal Power Act is the protection of the public's interest in a valuable natural resource, the power potential and navigable capacity of rivers (*see* Point II *supra*). Thus, the Commission's primary duty is to scrutinize carefully any proposed development, to assure that the public interest is served. As this Court noted in *Udall v. FPC*, 387 U.S. 428, 450 (1967):

> A license under the Act empowers the licensee to construct, for its own use and benefit, hydroelectric projects utilizing the flow of navigable waters and thus, in effect, to appropriate water resources from the public domain. The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest." . . .

Perhaps the most important "public interest" requirement is contained in § 10(a) of the Power Act, 16 U.S.C. § 803(a). That section requires the Commission to make a finding that a proposed project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes. . . ." This Court has interpreted § 10(a) as requiring the FPC to explore such issues as "future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife," before issuing

a license. *Udall v. FPC, supra* at 450. The "public interest" considerations mentioned in *Udall v. FPC, supra,* may, in some cases, outweigh the desirability of developing power, thereby requiring denial of a license application. *See, e.g., Namekagon Hydro Co.,* 12 F.P.C. 203 (1953), *aff'd,* 216 F.2d 509 (7th Cir. 1954); *Public Utility Dist No. 1 of Skamania County, Washington,* 32 F.P.C. 444 (1964). Other judicial opinions have recognized the Commission's "specific planning responsibility" under § 10(a). *See, notably, Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608, 613 (2d Cir. 1965), *cert. denied,* 384 U.S. 941; *Greene County Planning Bd. v. FPC,* 455 F.2d 412, 423 (2d Cir. 1972), *cert. denied,* 409 U.S. 849.

Section 10 also imposes a host of other requirements to protect the public interest. A licensee must maintain a power project so as to avoid impairing navigation and must operate such a project in conformity with the Commission's rules for the protection of life, health and property. 16 U.S.C. § 803(c). There are numerous financial requirements. A licensee must maintain adequate depreciation reserves (16 U.S.C. § 803(c)) and amortization reserves (16 U.S.C. § 803(d)); must pay a reasonable annual charge for administration expenses and use of government lands, government dams, and Indian lands (16 U.S.C. § 803(e)); and must pay the United States for any headwater benefits received as a result of construction of an upstream government dam (16 U.S.C. § 803(f)). Of special significance to the Indian respondents is the provision of 16 U.S.C. § 803(e) giving Indian tribes a veto over any project to be located on tribal land.[5]

Other sections of the Power Act afford additional safeguards for the public interest: a licensee must construct and maintain, or allow the government to construct and maintain,

[5]*See* Montana Power Co. v. FPC, 445 F.2d 739, 756 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 1013.

structures useful for navigation (16 U.S.C. § 804). The government may take over operation of any project after expiration of a license (16 U.S.C. § 807). The FPC must give preference among competing applicants to states and municipalities (16 U.S.C. § 800(a)), and may not grant a license to a private applicant if it finds that a project should properly be undertaken by the government itself (16 U.S.C. § 800(b)).

The public interest is given additional protection by a number of statutory and regulatory procedural provisions. The Commission has wide investigatory powers to assure compliance with the Act and may compel the attendance of witnesses and production of evidence (16 U.S.C. § 825f); any person may file a complaint with the Commission when a violation of the Act occurs (16 U.S.C. § 825e); licenses are to be granted only after notice (18 C.F.R. § 1.19(b)) and a hearing on the record (16 U.S.C. § 825g, 18 C.F.R. § 1.20), at which witnesses are subject to cross-examination (18 C.F.R. § 1.22). A Commission decision must include a statement of findings and conclusions and the basis therefor (18 C.F.R. § 1.30(g)); and any party aggrieved by a Commission action is entitled to judicial review (16 U.S.C. § 825*l*. None of these protections are available in connection with the discretionary award of a water delivery contract by the Secretary.

This case illustrates a relatively common phenomenon — concurrent and even partially overlapping jurisdiction by "two agencies of the Government having duties in relation to the development of national water resources." *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 155 (1953). Uniformly, the courts and Congress have sought to harmonize competing claims to authority, rather than ruling that one agency should prevail, to the complete exclusion of the other. In *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200 (4th Cir. 1967), *cert. denied*, 390 U.S. 945, the court rejected the

identical claim asserted in this case — that broad water allocational powers given to another agency concerned with development of a river basin superseded the FPC's jurisdiction. The power company there maintained that under 16 U.S.C. § 831y-1[6] operations at its project on the Tennessee River were so completely controlled by the Tennessee Valley Authority that TVA in effect operated the plant itself, thereby precluding FPC jurisdiction. The court noted that an ouster of FPC jurisdiction could not lightly be inferred:

> However, were we to infer from these incidents of control, an "operation" of the facilities by the TVA in the broad sense advocated, the result would be startling indeed. It would, in effect, exempt from the Power Act's licensing requirements all developments in the Tennessee River System. . . . The Commission, whose interests are broader

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[6]Section 831y-1 provides that:

> The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board.
>
> The requirements of this section shall not be construed to be a substitute for any other law of the United States . . . but shall be in addition thereto, so that any . . . license . . . now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except as may be constructed, operated, or maintained by the [TVA], shall be required, notwithstanding the provisions of this section.

This grant of power to TVA to control the utilization of Tennessee River waters is *at least* as extensive as the Secretary's powers under the "Law of the River." Nowhere is the Secretary given authority, like the TVA, to regulate *obstructions* in the Colorado River, as opposed to water use.

> than those of the TVA, and certainly no less important, would be precluded from implementing needed improvements or modifications consistent with the *national* interest. 384 F.2d at 213.

The *Nantahala* court also rejected the contention that "the Commission's regulatory power would, in light of the control exercised by the TVA . . . subject it to two masters, who may not always see eye to eye." 384 F.2d at 214. It noted that there was an "ample basis for accommodation among the interested parties. . . ." *Ibid.*

This Court considered and rejected a claim that the adoption of a comprehensive plan for development in a river basin by another branch of government (in that case, the Corps of Engineers) divested the FPC of jurisdiction to license private dams at any of the sites included in the plan. *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953). Justice Frankfurter characterized the power companies' claim in the *Chapman* case as follows: "[T]he authority of the agency to which Congress has delegated the responsibility for safeguarding the public interest in the private development of power resources has been revoked pro tanto by congressional action as to this particular site." 345 U.S. at 157.

This Court reviewed the FPC's broad authority to carry out a "general power policy," comparable to that of the Interstate Commerce Commission in the transportation field. Justice Frankfurter noted that Congress had made the Commission "the permanent disinterested expert agency of Congress to carry out these policies." 345 U.S. at 168. And concluded:

> [W]e find no solid ground for concluding that Congress has taken over the entire river basin for public development with such definiteness and finality so as to warrant us in holding that Congress has withdrawn as to this whole river basin its general grant of continuing authority to the Federal Power

Commission to act as the responsible agent in exercising the licensing power of Congress. 345 U.S. at 167.[7]

This phenomenon of concurrent jurisdiction by two federal agencies in a common subject matter is common in administrative law. There are any number of cases where this Court has arbitrated between competing agencies, without divesting either of jurisdiction. *See, e.g., Metlakatla Indian Community v. Egan,* 369 U.S. 45 (1962); *Northwestern Elec. Co. v. FPC,* 321 U.S. 119 (1944); *Swift & Co. v. United States,* 316 U.S. 216 (1942).

Neither the FPC nor the Secretary has ever previously asserted that the Secretary's broad planning and allocation powers on the Colorado River precluded Commission jurisdiction. Indeed, the Secretary has acquiesced in the Commission's assertion of authority over the River. The FPC held hearings on an application by the State of Arizona to build a hydroelectric dam on the River at Marble Canyon, 55 miles downstream from the Glen Canyon Dam.[8] The Secretary moved to intervene in order to assert his "responsibility to ensure the orderly investigation, planning and ultimate construction of a comprehensive system of water development projects with respect to the Colorado River System." *Arizona Power Authority,* 28 F.P.C. 769, 771 (1962) (concurring opinion). Limited and later full intervenor status was

[7] *See also* the Flood Control Act of 1944, which recognizes and attempts to harmonize the often competing claims of federal agencies to jurisdiction over water projects. While the Secretary of the Interior is empowered to investigate and propose irrigation projects, the Secretary of the Army must be kept informed and the latter official has a veto over such projects which can be overridden only by Act of Congress. 33 U.S.C. §701-1(c).

[8] The plans for the proposed Marble Canyon and Hualapai Dams, which would have encroached on the Grand Canyon, provoked such violent opposition that Congress later withdrew the FPC's jurisdiction to issue licenses for construction in this reach of the River, reserving the final decision to itself. 43 U.S.C. §1555. *See* 3 U.S. Code Cong. & Admin. News, 90th Cong., 2d Sess. 3730 (1968).

granted. *See* 30 F.P.C. 494 (1963). *See also Phelps Dodge Corp.*, 29 F.P.C. 552 (1963), in which the Commission licensed a dam on a Colorado River tributary that was subject to the "Law of the River." The Secretary appeared in that proceeding, too, without disputing FPC jurisdiction.

Even if the power companies are correct in their assertion that the allocation and planning authority given the Secretary by the "Law of the River" ousts the FPC from jurisdiction, this would not be true for all the plants involved in this appeal. Two of the plants are using water that is *not* under the Secretary's control. The Four Corners plant uses water rights granted by the New Mexico State Engineer (power companies' supplement to Brief, p. 96S); Huntington Canyon uses water rights purchased from private individuals (*Id.* at 119S). Thus, the controversy regarding FPC jurisdiction over these two plants would remain justiciable, regardless of the effect of the Secretary's supposed "plenary" authority on the other plants.

The power companies advance a trivial argument that the Indian respondents lack standing. It is utterly without merit. The complaint alleges that the six power plants will be responsible for severe air and water pollution, cause massive ecological imbalance, threaten them with economic harm, and damage aesthetic, cultural, recreational and economic values on their homelands. This is certainly "injury in fact," and the Indian respondents are clearly themselves "among the injured," as required by the first part of this Court's latest explication of the standing doctrine in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). (*See also Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), recognizing the right of local residents to achieve redress for "aesthetic and environmental injury.") This injury is certainly within "the zone of interests" protected by the Federal Power Act, the second part of the *SCRAP* standing test. *See* the cases cited in the

opinion below detailing the Commission's environmental concerns (App. 95a, n. 138).

The Indian respondents are also worried about increased salinity in the Colorado River. Operations at present and projected Colorado Basin power plants may increase salinity levels in the lower Colorado River by as much as 4 percent. Southwest Energy Study: Summary Report at 9-49 (1972). Those levels are already at the critical stage; even a small increase may render the water unuseable. *See, e.g.*, S. Rep. No. 906, 93rd Cong., 2d Sess. (1974); H. Rep. No. 1312, 90th Cong., 2d Sess. (1968), reprinted at 3 U.S. Code Cong. & Admin. News 3666, 3698, 3699 (1968).

Finally, the power companies advance what one must assume is a tongue-in-cheek argument that it makes no difference to the Indian respondents whether the Secretary or the Commission has jurisdiction. Aside from the numerous protections and opportunities available only before the FPC which we catalogued above, there is an obvious disparity in the remedies available in the event of an unfavorable decision. As this Court noted in *Dugan v. Rank*, 372 U.S. 609, 623-24 (1963), under the Reclamation laws, the Secretary is entitled to operate projects and distribute water "solely on his own, without court interference," even to the extent of taking existing property rights without compensation, relegating the owners to the remedy of inverse condemnation. In contrast, failure of the Federal Power Commission to consider and, if appropriate, to mandate measures designed to mitigate environmental impact is grounds for reversal. *See Udall v. FPC*, 387 U.S. 428, 450 (1967); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 614 (2d Cir. 1965), *cert. denied*, 384 U.S. 941; *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 423-24 (2d Cir. 1972), *cert. denied*, 409 U.S. 849.

## CONCLUSION

As we showed in Point III, the objectives of the Federal Power Act can now be carried out only if steam power plants are subject to the FPC's licensing jurisdiction, as permitted by the statutory language. The exercise of such jurisdiction would not create any insurmountable practical problems. Indeed, the Commission has often said it would like to exercise authority in this field. While the government (Brief, pp. 38-39) and the court below (App. 96a-97a) accuse the Indian respondents of advocating judicial legislation, we strongly maintain that this is not the case. We are only asking this Court to interpret an existing statute *as it is written.*

Rather, it is *they* who advocate unwarranted judicial intervention into the legislative process by seeking to vary the plain language used by Congress on the strength of speculation about what a long-dead group of legislators would have thought about a problem that was not in existence at the time. We believe that this Court should follow the advice of Mr. Justice Holmes: "We do not inquire what the legislator meant; we ask only what the statute means." Holmes, *Collected Legal Papers* 207, quoted at *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J. concurring).

The judgment of the Court of Appeals should be affirmed insofar as it holds that the six plants in this case must be licensed by the Federal Power Commission, but reversed as to its holding that the plants are not covered by the project works clause. This Court should also declare that the Com-

mission's jurisdiction is not superseded or diminished by the authority of any other federal agency.

Respectfully submitted,

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